(24,125)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 111.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND FRANK DRAKE, PLAINTIFFS IN ERROR,

vs.

DANIEL C. WHITEAKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 In the Supreme Court of Missouri, October Term, 1913.
March 10th, 1914.

DANIEL C. WHITEAKER, Respondent,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK M. DRAKE, Appellants.

TRANSCRIPT OF RECORD.

On May 2, 1908, the plaintiff filed herein his petition, which is as follows:

In the Circuit Court of Clinton County, Missouri, September Term, 1908.

DANIEL C. WHITEAKER, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE, Defendants.

Plaintiff, for his cause of action, states that the defendant, the Chicago, Rock Island & Pacific Railway Company, is, and was at all the times hereinafter mentioned, a railway corporation
2 duly organized and incorporated under the law and liable to be sued as such in the courts of this state, and is and was at all of said times in possession of and operating a line of railway running from the city of Chicago, Illinois, to Kansas City, Missouri, and in and through Clinton County in the state of Missouri, and is a common carrier; that the defendant, Frank Drake, is, and was at all the times hereinafter mentioned, in the employ of the defendant Railway Company as conductor on one of its trains, and the said defendant Frank Drake, is a citizen and resident of the county of Grundy in the state of Missouri, and plaintiff is now, and for many years has been, a resident and citizen of the state of Missouri.

Plaintiff further states that on or about the 20th day of July, 1905, at or near the crossing of the Atchison, Topeka & Santa Fe Railway Company at the town of Lathrop, Missouri, plaintiff, with the consent of, and under the direction, advice and invitation of the defendant Railway Company's servant, on and operating, and assisting to operate the hereinafter mentioned train, boarded and got upon one of defendant Railway Company's freight trains for the purpose of being transported thereon from said town of Lathrop to said Railway Company's station at Cameron, Missouri, and immediately after boarding said train plaintiff inquired of said servant of defendant Railway Company, who had so invited him onto said train, what the charge or fare would be for him to ride

thereon to said station of Cameron, and said servant then and there informed plaintiff that the charge or fare would be 25 cents, and for plaintiff to pay him that sum, and plain-
3 tiff did then and there pay said servant the said sum of 25 cents for the privilege of riding on said train to said station of Cameron; that afterwards, while plaintiff was so on said train and while said train was running at a high rate of speed and was near the station of Turney on said road, the defendant Drake, who was in the employ of said defendant, the Chicago, Rock Island & Pacific Railway Company, as a conductor, and as such was defendant Railway Company's conductor, agent and servant, on and in charge of said train, and while acting in the line of his duties to defendant Railway Company as such conductor and agent, and in the course of his employment, approached plaintiff (who was then sitting on the top of one of the cars in said train) and wrongfully and unlawfully, and with great and unusual and unnecessary force and violence, and in an improper and wrongful manner, forced and ejected plaintiff from the top of said car and train to the ground, and wrongfully and unlawfully kicked him therefrom, all while said train was running at said high rate of speed, and when it was dangerous and unsafe for plaintiff to have attempted to alight therefrom, and plaintiff was, by reason of said wrongful ejection and kicking from said train and all of the above, and without any fault on his part, thrown and made to fall to the ground below and greatly and permanently injured, as hereinafter set out; that all the aforesaid acts and conduct on the part of said Drake were done and performed while in the course of his employment to defendant Railway Company, and in the line of his duties to defendant Railway Company and as a part of his duties,
4 and said defendant Drake was defendant Railway Company's agent and servant, in charge and command of said train, and had control thereof.

Plaintiff states that by reason of the wrongful acts of the defendants aforesaid, and of the injuries resulting directly therefrom, his back, hips and spine were wrenched and bruised and permanently injured, both of his arms broken and permanently injured, and his shoulder broken and permanently injured, his collar-bone broken, his ribs broken, and three of his teeth knocked out, and his head, face and body cut, bruised and lacerated and permanently injured, and plaintiff otherwise greatly and permanently injured, disfigured, disabled and crippled; that he has suffered and will hereafter suffer great pain of body and anguish of mind; that plaintiff, who is a farmer and laboring man by occupation, has ever since been, and will hereafter be incapacitated from performing work and labor, and he has lost, and will hereafter lose, the earnings of his time and labor; that he was necessarily compelled to expend and lay out, and has become liable to expend and lay out, various sums of money for drugs, medicines and medical attention in and about endeavoring to cure himself of the injuries aforesaid, and he pleads the same, and loss of time and earnings, as special damages.

Plaintiff states that he has been damaged by the wrongful acts

of the defendants aforesaid in the sum of fifteen thousand dollars ($15,000), for which sum he prays judgment.

PROSS T. CROSS,
Attorney for Plaintiff.

5 On the — day of September, 1908, it being the first day of the September term, 1908, of said court, the defendant, the Chicago, Rock Island & Pacific Railway Company, filed herein its petition and application for removal of this cause to the Federal Court. And said defendant also filed at said time the affidavits of C. L. Berger and Frank M. Drake in support of said application for removal. And on the same day the said defendant filed herein its bond for removal and the said bond was then and there by the court duly approved.

And the said application and petition for removal to the Federal Court being seen and heard by the court, was, by the court, refused and overruled; to which action of the court the said defendant at the time excepted and still excepts.

Petition for Removal to the United States Circuit Court.

In the Circuit Court of Clinton County, Missouri, September Term, 1908.

DANIEL C. WHITEAKER, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, and FRANK DRAKE, Defendants.

Your petitioner, the Chicago, Rock Island & Pacific Railway Company, respectfully shows:

1. That this action was begun in the Circuit Court of
6 Clinton County, Missouri, on or about the 2d day of May, 1908, by plaintiff, by filing in the office of the clerk of said court a petition, and by service upon the defendant of a writ of summons; that said cause is still pending and undetermined, and that the term of said court to be begun and held in the city of Plattsburg, Clinton County, Missouri, on the second Monday in September, 1908, is the first term at which said cause may be tried; that said cause has not yet been tried, and that the defendant, the Chicago, Rock Island and Pacific Railway Company, has not answered or pleaded to plaintiff's petition, and is not required under the laws of this state, or the rules of said court, to answer or plead to plaintiff's petition until the 14th day of September, 1908.

2. That this action is founded upon the alleged liability of the defendants for damages resulting from certain personal injuries received by plaintiff on or about the 20th day of July, 1905, and alleged to have been caused by the negligence of the defendant, the Chicago, Rock Island & Pacific Railway Company, and one Frank Drake, an employe of said defendant, the Chicago, Rock Island &

Pacific Railway Company; that said cause is of a civil nature, and that the plaintiff in his petition claims the sum of $15,000 as damages from the defendants, and that the matter in dispute in said controversy exceeds, exclusive of interest and costs, the sum or value of $2,000, to-wit: $15,000.

3. That this action involves a controversy between citizens of different states. That the plaintiff, Daniel C. Whitcaker, was at the time of the commencement of this action, and at all times since has been, and now is a citizen and resident of the state of
7 Missouri, and not a citizen or resident of the state of Illinois or the state of Iowa. That the defendant, the Chicago, Rock Island & Pacific Railway Company, is a corporation duly organized and existing under and by virtue of the laws of the states of Illinois and Iowa, having its principal place of business in the city of Chicago, in said state of Illinois, and was at the time of the commencement of this action, ever since has been, and still is, a citizen of the states of Illinois and Iowa, and not a resident or citizen of the state of Missouri.

4. That this action involves a controversy which is wholly between citizens of different states, as aforesaid; that the alleged cause of action is a separable controversy which can be fully determined between the plaintiff and your petitioner, and the whole subject-matter of the suit is capable of being finally determined between them and complete relief afforded as to the separate cause of action without the presence of the other party originally made a party to this suit. And your petitioner, the Chicago, Rock Island & Pacific Railway Company, says that the said Frank Drake was joined as defendant in this action by the plaintiff for the sole and fraudulent purpose of defeating and preventing this defendant from removing this action from the state court in which it is now pending to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, and for the sole and fraudulent purpose of defeating said jurisdiction of the said United States Circuit Court in this action.

5. That this action involves a controversy which is wholly
8 between citizens of different states, as aforesaid; that the alleged cause of action is a separable controversy which can be fully determined between the plaintiff and your petitioner, and the whole subject-matter of the suit is capable of being finally determined between them, and complete relief afforded as to the separate cause of action without the presence of the other party made a party to this suit, as the petition of the plaintiff does not state a cause of action against the defendant Frank Drake, and his presence as a defendant in this suit was for the sole and fraudulent purpose of defeating and preventing your petitioner from removing this action as aforesaid to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri; that the plaintiff did not have, and could not have had, at the time of the institution of this suit, nor has he now, any cause of action against the defendant Frank Drake, or any reasonable ground upon which to base a cause of action, or upon which to base a recovery against the defendant

Frank Drake; all of which was known to the plaintiff at the time of the institution of said suit; that the defendant Frank Drake was not present at the time and place mentioned in plaintiff's petition, all of which was known to the plaintiff at the time of the institution of said suit; that the said Frank Drake is a man of small means, and he has no, or but little, property from which a judgment against him in this action, if such were recovered, could be collected, and that this defendant is, and was at the time of the institution of this action, entirely solvent and able to pay any debts that may exist against it; that it has a large amount of property, and more
9 than sufficient to pay the amount sued for in this action within the jurisdiction of this court, and, according to the allegations in plaintiff's petition, any act of negligence on the part of the defendant Frank Drake alleged to have produced the injury to this plaintiff, was an act of this defendant, and, accordingly, this defendant is responsible and liable for the same. That the plaintiff, when he instituted this action, did not have any reasonable hope, intention or expectation of recovering any judgment or collecting any money from the defendant Frank Drake, on account of the accident or injuries to the plaintiff mentioned in the petition.

6. Your petitioner offers herewith a bond with good and sufficient surety for entering in the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, the first day of its next session, a copy of the record of this action, and for paying all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that this action was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said suit if special bail was originally requisite therein.

Wherefore, your petitioner prays that this action may be removed to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, and that this court proceed no further herein.

M. A. LOW,
PAUL E. WALKER,
E. C. HALL,
Attorneys for Defendant.

10 STATE OF KANSAS,
County of Shawnee, ss:

Paul E. Walker, of lawful age, being first duly sworn, upon his oath deposes and says that he is the agent and assistant general attorney of the above named defendant, the Chicago, Rock Island & Pacific Railway Company, and, as such, makes and is authorized to make this affidavit; that he has read the above and foregoing petition, and knows the contents thereof, and that the averments and allegations thereof are true, as he verily believes.

PAUL E. WALKER.

Subscribed and sworn to before me this 21st day of August, 1908.
[L. S.] LUTHER BURNS,
Notary Public.

My commission expires April 24, 1911.

And on the same day said defendant filed herein its bond for removal, which is in the words following, to-wit:

Bond.

In the Circuit Court of Clinton County, Missouri, September Term, 1908.

DANIEL C. WHITEAKER, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, and FRANK DRAKE, Defendants.

We, the Chicago, Rock Island & Pacific Railway Company, as principal, and E. C. Hall, as surety, are held and firmly bound unto Daniel C. Whiteaker, the above named plaintiff, in the sum
11 of one thousand dollars, lawful money of the United States of America, to be paid to said Daniel C. Whiteaker, his heirs, executors or administrators, for which payment, well and truly to be made, we bind ourselves, our successors, heirs, representatives, executors and administrators, jointly and severally, firmly by these presents.

Upon this condition:

Whereas, on or about the 2d day of May, 1908, an action was brought by said Daniel C. Whiteaker against the Chicago, Rock Island & Pacific Railway Company and Frank Drake in the Circuit Court of Clinton County, Missouri, and is now pending for trial in said court, and is removable into the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, and by virtue of the Act of Congress in such case made and provided; and

Whereas, said The Chicago, Rock Island & Pacific Railway Company has filed its petition in said Circuit Court for the removal of said action into the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, now, therefore,

The condition of the above obligation is such that if the above bounden The Chicago, Rock Island & Pacific Railway Company, or its successors, shall enter or cause to be entered in the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, on the first day of the next term thereof, a copy of the record in this action, and shall pay all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that this action was wrongfully or improperly removed thereto,
12 and shall then and there enter special bail in said action, if the same were originally requisite therein, and do and perform all other things by law to be done on the removal of actions from state to United States courts, then the above obligation to be void; otherwise, to be and remain in full force and effect.

In Testimony Whereof, said The Chicago, Rock Island & Pacific Railway Company has caused this bond to be executed by M. A.

Low, its agent and general attorney, and said E. C. Hall has hereunto set his hand and seal.

Sealed with our seals and dated this 21st day of August, 1908.

[SEAL.] THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By M. A. LOW,
Its Agent and General Attorney.
[SEAL.] E. C. HALL.

And on said day the said bond was by the court duly approved.

13 *Affidavit of C. L. Burger in Support of Petition for Removal.*

In the Circuit Court of Clinton County, Missouri, September Term, 1908.

DANIEL C. WHITEAKER, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, and FRANK DRAKE, Defendants.

STATE OF KANSAS,
County of Brown, ss:

C. L. BURGER, of lawful age, being first duly sworn, upon oath, deposes and says:

My name is C. L. Burger; I live at Horton, Brown County, Kansas, where I am employed as a switchman in the yards of the above named defendant, the Chicago, Rock Island & Pacific Railway Company. On the night of July 20th and 21st, 1905, I was rear brakeman on train No. 490, running from Kansas City, Missouri, eastward to Trenton, Missouri, and to points east thereof. This train was in charge of Frank Drake as conductor. As rear brakeman on said train, my position was in the caboose of said train while it was in motion. On the night in question, heretofore referred to, I remained in the cupola of the caboose attached to said train No. 490 until we reached the crossing of the Atchison, Topeka & Santa Fe Railway Company west of Lathrop, Missouri. At this place I got out through the cupola on top of the caboose, and remained on top of the caboose until we passed the depot at the said station of Lathrop. At said station of Lathrop, Conductor Frank Drake went down the steps of the caboose and stepped upon the station
14 platform long enough to receive an order. Said train No. 490 left the said station of Lathrop immediately, and I got back in the cupola of the caboose and remained there until the train reached Cameron Junction, Missouri. Between the said stations of Lathrop, Missouri, and Cameron, Missouri, Conductor Frank Drake rode in the caboose attached to said train No. 490, riding either in the cupola of the said caboose with me, or working at his desk in the said caboose. I know of my own knowledge and am positive that the said Frank Drake as conductor of said train No. 490 did not at

any time or place between the said stations of Lathrop, Missouri, and Cameron Junction, Missouri, between which said stations the station of Turney, Missouri, is located, leave the caboose attached to said train No. 490. And I am likewise positive that the plaintiff in the above entitled case, Daniel C. Whiteaker, was not in or upon said caboose attached to said train No. 490 between said stations of Lathrop, Missouri, and Cameron Junction, Missouri.

And further, affiant saith not.

C. L. BURGER.

Subscribed and sworn to before me this 24th day of August, 1908.

B. B. NORRIS,
Notary Public.

[SEAL.]

My commission expires March 20, 1910.

15 *Affidavit of Frank Drake in Support of Petition for Removal.*

In the Circuit Court of Clinton County, Missouri, September Term, 1908.

DANIEL C. WHITEAKER, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE, Defendants.

STATE OF KANSAS,
County of Shawnee, ss:

FRANK DRAKE, of lawful age, being first duly sworn, on oath deposes and says:

My name is Frank Drake; I live at Trenton, Missouri, where I am employed as a switchman in the yards of the above named defendant, the Chicago, Rock Island & Pacific Railway Company; I am the person who is sued as one of the defendants in the above entitled action, and have been served with process in said suit. On the night of July 20th and 21st, 1905, I was a conductor in charge of train No. 490, running from Kansas City, Missouri, eastward, to Trenton, Missouri, and to points east thereof. When my train reached the station of Lathrop, I stepped from the caboose upon the platform and received an order for my train, which scarcely came to a stop at the said station of Lathrop. As soon as I had received the order, the train proceeded, and I entered the caboose, where I was busy with my work until the train reached Cameron Junction, Missouri. Between the said stations of Lathrop, Missouri, and Cameron Junction, I was not outside of the caboose upon said
16 train, nor at any time between said stations was I upon the top of the train or any of the cars therein; I did not see the plaintiff, Daniel C. Whiteaker, upon said trip, neither did I see any other persons outside of the crew of said train between said stations of Lathrop, Missouri, and Cameron Junction, Missouri, nor did I hear

of the occurrences referred to in plaintiff's petition until some time after their alleged occurrence. At no time on said trip, and between the said stations of Lathrop, Missouri, and Cameron Junction, Missouri, did I have any conversation with any person outside of the members of the crew of my train, nor did I authorize any person, and especially the plaintiff herein, to ride upon my train from Lathrop, Missouri, to Cameron, Missouri, nor did I at any time upon said trip, and especially between the said stations of Lathrop, Missouri, and Cameron, Missouri, between which said stations the station of Turney is located, attempt to eject any person whatsoever, and especially the plaintiff herein, from my train. I am not acquainted with the plaintiff, Daniel C. Whiteaker; I never saw him, to my knowledge previous to the institution of suit for his alleged injuries, and never at any time in any manner, or at any place, attempted to eject him from any train in my charge, or assault, or attempt to assault him in any way whatsoever.

And further affiant saith not.

FRANK M. DRAKE.

Subscribed and sworn to before me this 21st day of August, 1908.

[SEAL.] LUTHER BURNS,
Notary Public.

My commission expires April 24, 1901.

17 On January 13, 1910, the cause was submitted to the jury, which returned into court a verdict as follows:

"We, the jury, find for the plaintiff and against both defendants herein and assess his damages at $8,500.00.

CHARLES JACKSON.
J. W. MAYES.
ED ROGERS.
THEO. FULLER.
W. M. PARSONS.
J. A. WRIGHT.
C. C. CHIPMAN.
J. B. CROW.
SMITH MILLER.
T. S. NEWBY.
AUTON GREASON."

Which said verdict was received and the jury discharged.

Whereupon, the court rendered the following judgment:

"It is therefore ordered and adjudged by the court that the plaintiff, Daniel C. Whiteaker, do have and recover of each of the defendants in the above entitled cause the said sum of eight thousand five hundred (8,500.00) dollars, the amount so assessed by the jurors aforesaid, together with his costs and charges in this behalf expended, and ordered that execution issue therefor."

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and correct copy of the portions of Abstract of Record, in the case of Daniel C. Whiteaker, Appellant, v. Chicago, Rock Island & Pacific Railway Company and Frank M. Drake, Respondents, as fully as called for in the præcipe filed herein.

In testimony whereof, I hereunto set my hand and affix the seal of the Supreme Court of Missouri. Done at office in the City of Jefferson, State aforesaid, this 10th day of March, A. D. 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

18 In the Supreme Court of Missouri, Oct. Term, 1913, in Banc.

No. 16138.

DANIEL C. WHITEAKER, Respondent,
v.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE, Appellants.

Suing for personal injuries in negligently ejecting plaintiff from defendant Railway Company's freight train, a jury returned him a verdict for $8,500 in the Clinton circuit court. From a judgment following that verdict, both defendants appeal, raising four questions only, viz:

First. The State court lost jurisdiction on the corporate defendant's filing a petition for removal to the Federal court, hence the judgment is coram non judice.

Second. There was reversible error in not sustaining a demurrer to the evidence at the close of plaintiff's case in chief, and, finally, in refusing to direct a verdict in favor of the corporate defendant at the close of the whole case.

Third. And similar error in admitting improper expert testimony.

Fourth. And similar error in instructing the jury that if they found for plaintiff to find against both defendants, and in refusing an instruction contra.

Many exceptions were taken nisi, but appellants have pretermitted a group of them on final submission, the gist of the remainder being set forth above. Of those questions in their order, any facts necessary to an understanding and disposition of either appearing in that connection.

I.

Of Jurisdiction.

19 Appellants insist the trial court lost jurisdiction in this way: Prior to answering the corporate defendant filed its verified petition for a removal of the cause to the Circuit Court

of the United States for the St. Joseph Division of the Western District of Missouri, and tendered its bond. On leave it filed affidavits supporting its petition for removal. The petition for removal admits Whiteaker is a citizen and resident of Missouri and by implication that defendant Drake is the same, but alleges the corporate defendant is a citizen and resident (not of Missouri, but) of Illinois and Iowa. That the cause of action is a separable controversy "which can be fully determined between plaintiff and your petitioner" without the presence of Drake. That Drake was joined for the sole and fraudulent purpose of preventing removal to the Federal Court and defeating the jurisdiction of that Court. That plaintiff could not have had at the time of the institution of the suit any cause of action against Drake, who has no property out of which the judgment could be made, whereas, to the contrary, the petitioner is solvent and able to pay its debts. Then follows this: "* * * according to the allegations in plaintiff's petition, any act of negligence on the part of the defendant Frank Drake alleged to have produced the injury to this plaintiff, was an act of this defendant, and, accordingly, this defendant is responsible and liable for the same. That the plaintiff, when he instituted this action, did not have any reasonable hope, intention or expectation of recovering any judgment or collecting any money from the defendant Frank Drake, on account of the accident or injuries to the plaintiff mentioned in the petition."

The affidavits filed in support were to the effect that Drake was not on top of his train on the trip from Lathrop to Cameron and neither could attempt to, nor did eject any person from the train.

The petition for removal was denied and defendants saved an exception.

The question is: Did that application oust the jurisdiction of the state court, and hence, were all after proceedings without
20 jurisdiction?

To determine that question heed must be given to the averments of plaintiff's petition anent his cause of action. It alleges, inter alia, that Drake, a resident and citizen of Missouri, was in the employ of his co-defendant as a conductor of one of its trains, and then in part as follows (quoting):

"Plaintiff further states that on or about the 20th day of July, 1905, at or near the crossing of the Atchison, Topeka & Santa Fe Railway Company at the town of Lathrop, Missouri, plaintiff, with the consent of, and under the direction, advice and invitation of the defendant Railway Company's servant, on and operating, and assisting to operate the hereinafter mentioned train, boarded and got upon one of defendant Railway Company's freight trains for the purpose of being transported thereon from said town of Lathrop to said Railway Company's station at Cameron, Missouri, and immediately after boarding said train plaintiff inquired of said servant of defendant Railway Company, who had so invited him onto said train, what the charge of fare would be for him to ride thereon to said station of Cameron, and said servant then and there informed plaintiff that the charge or fare would be 25 cents, and for plaintiff to pay him that sum and plaintiff did then and there pay said servant the said sum of 25 cents for the privilege of riding on said train to

said station of Cameron; that afterwards, while plaintiff was so on said train and while said train was running at a high rate of speed and was near the station of Turney on said road, the defendant Drake, who was in the employ of said defendant, the Chicago, Rock Island & Pacific Railway Company, as a conductor, and as such was defendant Railway Company's conductor, agent and servant, on and in charge of said train, and while acting in the line of his duties to defendant Railway Company as such conductor and agent, and in the course of his employment, approached plaintiff (who was then sitting on the top of one of the cars in said train) and wrongfully and unlawfully, and with great and unusual and unnecessary force and violence, and in an improper and wrongful manner, forced and ejected plaintiff from the top of said car and train to the ground, and wrongfully and unlawfully kicked him therefrom, all while said train was running at said high rate of speed, and when it was dangerous and unsafe for plaintiff to have attempted to alight therefrom, and plaintiff was, by reason of said wrongful ejection and kicking from said train and all of the above, and without any fault on his part, thrown and made to fall to the ground below and greatly and permanently injured, as hereinafter set out; that all the aforesaid acts and conduct on the part of said Drake were done and performed while in the course of his employment to defendant Railway Company, and in the line of his duties to defendant Railway Company and as a part of his duties, and said defendant Drake was defendant Railway Company's agent and servant, in charge and command of said train, and had control thereof."

The ruling below was right, because: It was for plaintiff, not defendant, to elect who should be sued on a joint liability sounding in tort. When a plaintiff sues both corporate master and individual servant on a liability that appears on the face of his petition
21 to be joint, the cause is not removable to the Federal court, although the master be a non-resident and not a citizen of the State, where, as here, the servant is a resident and citizen of the State. The presence of the resident citizen, as a party defendant, carries the case outside of the intendment of the Federal statute.

If there had been a question of fact on Drake's citizenship and residence we might have had a different question to deal with. So, if the negligence of the servant had been a mere act of nonfeazance instead of one of misfeazance, as it was, there might have been a different question. So, if the petition had disclosed any other liability against the master and not against the servant.

The question whether a removal should go always harks back to the allegations of plaintiff's statement of his cause of action in his petition. Removability, in that feature of it, becomes a mere question of law, with which it was the duty and right of the State court to deal in the first instance. If the controversy as stated raised a joint liability and was not on the face of the petition separable, an inquiry into the secret motives of plaintiff in joining defendants and seeking a recovery from both, such as defendant here rely on, is of no efficacy in determining either jurisdiction or liability.

So patent is the joint liability in the instant case that if Drake

had been acquitted the corporate defendant would have escaped too, as a matter of law. (McGinnis v. Railroad, 200 Mo. 347.)

The question, long vexed, is one whereon the law may yet be in a fluid or formative state and the last word not spoken. But there is a body of learning in our own reports following the final arbiter in that behalf and sustaining the views just announced. A mere reference to those cases suffices. (Lanning v. Railroad, 196 Mo. l. c. 656 et seq.; Stotler v. Railroad, 200 Mo. l. c. 117 et seq.; Johnson v. Railways, 203 Mo. l. c. 398 et seq.; State ex rel. v. Mos-
22 man, 231 Mo. 474—a case in which, on certiorari, we quashed an order granting a removal; Schwyhart v. Barrett, 145 Mo. App. l. c. 344 et seq.; State ex rel. v. Dearing, 244 Mo. l. c. 37.)

Those cases were ruled on the authority of decisions delivered by the highest court in the land on Federal questions.

Diligent counsel on both sides have cited us to later decisions in the Supreme Court of the United States, but they do not modify the rulings on which the Lanning, Stotler, Johnson, Mosman and Schwyhart cases were decided. The latest is that in which that court passed on the case of Schwyhart v. Railroad, 145 Mo. App. supra. (33 Sup. Ct. Rep. p. 250, not yet officially reported). In the Schwyhart case the State court denied a petition for removal on the very grounds in judgment in the instant case and that course was approved in the Supreme Court of the United States when taken there on error. Speaking in that case to questions involved here, that court, through Mr. Justice Holmes, said:

"The joint liability of the defendants under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the state before which the question could come. Southern R. Co. v. Miller, 217 U. S. 209, 215, 216. * * * Again, the motive of the plaintiff, taken by itself, does not affect the right to remove. If there is a joint liability, he has an absolute right to enforce it, whatever the reason that makes him wish to assert the right. Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 427, 55 L. ed. 521, 527, 30 Sup. Ct. Rep. 460; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101. Hence the fact that the company is rich and Barrett poor does not affect the case.

The remaining justification for the charge of fraudulent intent is that no cause of action was stated against Barrett. That again is a question of state law, and that the plaintiff had such a cause
23 of action in fact must be taken now to be established."

The premises considered, the point is ruled against appellants.

II.

Of the Demurrer (and Herein of the Mandatory Instruction).

At the close of plaintiff's case in chief, demurrers to the evidence were overruled. But neither of defendants was content to stand on those demurrers. Contra, they went on and put in their own proof. In this condition of things, two apposite and quickening propositions spring at the threshold, thus:

(*a*) When that course is taken, a working and primer rule in this jurisdiction is this: a defendant uniting the two functions of demurring and then not standing on his demurrer but going on and putting in his own proof thereby in so far forth waives his demurrer that he elects to have the matter judged of by the whole evidence precisely as if on an instruction at the close of the case to direct a verdict. Hence in this case a consideration of the instruction to direct a verdict will cover the dual assignment. (Stauffer v. Railroad, 243 Mo. l. c. 316; McPherson v. Railroad, 97 Mo. 253.)

(*b*) Moreover, back of everything is the guiding rule that where plaintiff has a verdict, as here, then, in ruling a demurrer to the evidence (or a mandatory instruction filling the office of one), appellate courts accept plaintiff's evidence as true whether contradicted or not by defendant's proof (so long as it is not impossible as opposed to the conceded physics of the case, or as beyond all reason or where perjury is patent). They assume defendant's testimony as false where contradicted by plaintiff's proof. They leave to the jury to settle the weight due testimony, the credit due witnesses and to reconcile contradiction or smooth away inaccuracies, if any, in the proof. Withal, they allow to plaintiff the grace of every reasonable inference of fact arising in his favor on any
24 of the substantial proof. (Stauffer v. Railroad, 243 Mo. l. c. 316; Cohn v. Kansas City, 108 Mo. l. c. 392; Wright v. Kansas City, 187 Mo. l. c. 691; Fritz v. Railroad, 243 Mo. l. c. 77.)

May not one with propriety (when the yeast of radical novelty is working in judicial dough and one does not know what the loaf to be baked in the oven of events may be), take leave to recur to first principles and observe, to-wit, that the invention of a jury to weight and determine the credit due to human testimony, and settle facts in doubt or dispute in a trial at law, is to be rightly taken as one of the splendid achievements of civilized man. While not ideally perfect, yet, having been brayed in the mortar of experience with the pestle of common sense, as human institutions run trial by jury has stood the test of use and justifies itself as indispensable. No one but a sour-complexioned cynic now impugns it, no one but an inconsequent dreamer suggests a substitute. "A jury trial is the most cherished, if not the most valuable institution, we have derived from our Saxon ancestors * * *" (Per Ormond, J., in Swift v. Fitzhugh, 9 Port. (Ala.) l. c. 66-7.) The average judgment of twelve jurymen of average sense, drawn, as they are, from all the walks of life and impartially selected, ("whose learning consists only in what they themselves have seen and heard" and who "apply their separate experience of the affairs of life to the facts proved") is more likely to reach a practical result in sifting, weighing, rejecting, reconciling proof, and deciding facts than is that of the trained and technical reasoner or specialist whose mind runs in the groove of artificial analysis and logic; for peradventure men do nor usually get into trouble through logical processes and logicians can not always get them out of it.

It can not be said too often that it is that average reasonable sense of the average jury that courts seek for and delight in in settling

controversies of fact between man and man. Agreeably thereto are many wise and brave words by many wise and grave men, as the curious may verify by consulting; Railroad v. Stout,
25 17 Wall. l. c. 663; Fetter v. Fidelity and Casualty Co., 174 Mo. l. c. 266; Jefferson's First Inaugural Address, March 4th, 1801. "The jury are the best doctors of doubt that we know of." (Per Bleckley, J., in Central Railroad Co. v. Ferguson, 63 Ga. l. c. 85.) "It was because the people knew the judges were poor judges of the facts that they committed their decisions to a jury, and every day experience conforms the wisdom of their action." (Per Caldwell, J., in Meyers v. Railroad, 95 Fed. l. c. 414.) For the sum of the matter consult the eulogy of Brougham, copied into Simpson v. Witte Iron Works, 155 S. W. l. c. 819, not yet reported.

The deference allowed on appeal to the trial chancellor in an equity case on the facts, when the evidence is oral (Bivert v. Creamer, 214 Mo. l. c. 479 et seq.) transmutes itself into a preclusive prerogative in a jury in a law case, ex necessitate rei. So that it has long since passed into a maxim that judges respond to questions of law, and juries respond to questions of fact. (Ad quæstionem etc. Coke Litt. 295.)

It is — the light of the foregoing, and not otherwise, that the mandatory instruction must be reviewed.

(c) As it searches the facts, they follow, to-wit:

There is no dispute worth while but that on the 20th day of July, 1905, the corporate defendant ran a freight train in charge of its co-defendant Drake, as conductor, from Lathrop to Cameron. It left Lathrop in the shank of the evening and was a "through freight" that did not stop at Turney (an intermediate way-station) and usually did not carry passengers. Plaintiff was a country boy humbly bred, living in De Kalb county, close to Cameron. He testified, and no one gainsaid it, that he never rode on a train before. He appears to have been about 17 years of age, a fact determinable by his age of 20 at the trial three years later. There is testimony he had earned as high a- $30 a month as a farm hand but he had been working mostly for his father in the routine labors of farm life. On the said day of July he took a day off for a lark, went to Cameron to see a circus and thence on a train with some
26 comrades to Turney, and thence on to Lathrop. There is no doubt but that he rode back on Drake's freight train from Lathrop as far as Turney, and that he got off, fell off, or was put off the moving train at Turney on his way back in the night time. There is no doubt but that he was seriously injured in broken bones, teeth knocked out and, possibly, in a concussion of the brain or fractured skull, when he got off the train. It would encumber this opinion to set forth the particulars of his injuries or the testimony pro or con on their permanency, or their effect on the impairment of the motion and use of his right shoulder and arm, or in the impairment of his mind, loss of weight and nervous disorders. This is so because, strange to tell, though the judgment is a heavy one for compensatory, (without punitive) damages, yet this anomolous condition exists, viz: While complaint was made in the motion for

a new trial that the verdict was excessive, yet no such point is made in appellants' assignments of error or in their brief or printed argument.

Plaintiff brought three suits on his cause of action. In on- of them, instituted over a year after the event, he asked only $1,000 actual damages but included another $1,000 for smart money. The petition in that case, for obvious reasons, was read into this record by defendants. In the present case, brought three years after the event, he asked $15,000 compensatory damages. Besides the admission made in his former petition, there was evidence tending, if believed, to show that plaintiff's case had grown and improved with age. All this, however, is, secundum regulam, a closed and sealed book on this record.

It is shown that conductor Drake had authority, as one of his duties, to put off trespassers from his train. It was shown on the issue of his being kicked off or jumping off, that plaintiff from the outset told one unvarying story, namely, that he was kicked off—this from an hour or so after the event, when he got relief, until his trial. Plaintiff weighed 150 pounds, while 135 was Drake's weight.

27 The foregoing facts may be taken as undisputed. But on all other vital ones there is irreconcilable disagreement.

Omitting details in giving disputed facts and confining ourselves to the tendency of the proof, the case is this:

(NOTE.—In the narration of facts following, which plaintiff's testimony tends to prove, the testimony of defendants must be taken as throughout in practically direct conflict with plaintiff's. In fact, as the cold record reads, the countervailing testimony of defendants sharply preponderates and if the jury had believed defendants', instead of plaintiff's, no fault could have been found.)

Plaintiff introduced testimony tending to prove that on the platform of the depot at Lathrop he asked on- of the trainmen if he could ride back to Cameron on the freight train then at the depot; that getting permission he climbed the ladder to the top of a box car and seated himself, his feet projecting over the edge. Whether his feet merely projected or his legs dangled from the knees down is not clear. That shortly after the train started a brakeman came up to plaintiff, and, conversing with him, collected twenty-five cents for his fare to Cameron and then went on to the head of the train; that just as the train got to Turney defendant Drake came out of the cupola of his caboose, approached him with a lantern and with a vile epithet inquired what plaintiff was doing there and thereupon kicked him violently in the small of the back off of the train. In his fall he received the injuries for which he presently sued. Contra, testimony from all the brakemen and the conductor went in tending to show that plaintiff was not seen by any one of them to get on, or to be on, top the train during the trip, and that he (or no one else) was kicked off by the conductor or any of the trainmen. Defendants' testimony, if true, also established an alibi for Drake, to-wit, that he was not on the top of the train during the trip. Testimony, however, was allowed to go in without objection that Drake after-

wards, on being accosted by plaintiff's brother, thus: "My name is Whiteaker. You are the fellow that kicked my brother off
28 down here by Turney," replied: "No, I didn't kick him off, I pretended like I was going to kick him off and he jumped off," or "started at him like I was going to kick him off and he jumped off." Such conversation Drake denies. There was much medical testimony on both sides (as usual, in conflict) but it fills no office on demurrer. So, there was testimony pro and con, on the ability of plaintiff to recognize the conductor, and on how he come to identify him subsequently, and on contradictory statements said to be made by him as to whether it was the conductor that kicked him off or a brakeman, and on the extent and permanency of his injuries, but on demurrer we have nothing to do with those features. One and all they were for the jury. The same may be said of the testimony this way and that on whether plaintiff did or did not intend to stop at Turney in riding back from Lathrop, and whether he had not engaged a room there in which to stop for the night, with one Jackson—the significance of this feature being to show that he voluntarily got off at Turney to meet that engagement, one he admits making, but says he abandoned (which latter Jackson corroborates).

The foregoing is sufficient statement of the tendency of the proof on which to rule the mandatory instruction.

We think it soundly ruled below, this because:

It would be mere ostentatious display of industry and learning to analize the fo-rescore cases appellants cite to sustain their contention that the corporate defendant is not liable on the facts of this record, nor the two score that respondent cites to sustain his contention contra. This is so because, at bottom, the doctrine of all well reasoned cases is that, under the maxim respondeat superior, the master must answer in certain circumstances for the wrongful act of his servant precisely as the principal must answer for those of his agent. The general rule is that the maxim, respondeat, applies when the servant, in the line of his employment about his master's business, seeks to accomplish his master's purposes and in doing so acts negligently, or wilfully and maliciously, or even con-
29 trary to his orders or criminally, in some instances. That general rule is hornbook doctrine and beyond dispute. The difficulty is in applying it to the circumstances and facts of each particular case; for it would be intolerable to hold the master liable when his servant was pursuing his own ends for his own purposes, and not the master's, and in doing so commits a wrong. The employer of men would be in hard lines if that were the law. Between the two extremes of an obvious case of liability on one side and an obvious one of non-liability on the other, lie many cases close to the border line dividing liability from non-liability.

Both sides have cited cases of that sort from other jurisdictions, but our own cases are rich enough in learning to point the way to a proper disposition of the instant case, and on the authority of those cases we must hold with respondent on the point.

Assuming Drake kicked respondent off the moving train, as we must under the verdict, there is not a particle of testimony tending to show he was acting for himself for private ends or otherwise than about his duties in ridding the train of a trespasser. We pause to ask: Are we to airily suppose that Drake was booting trespassers (unknown to him, and with whom he had no personal quarrel) from his master's trains in the night-time for the mere fun of it? Or like Don Quixote was seeking knightly adventures in righting wrongs of others, because of a fixed idea of general personal duty to mankind, (or love of knightly renown) shading off into melancholia on the edge? Or was a monster of ingrained cruelty with a habit of wreaking his malice on those who stole rides on the freight trains of his codefendant? Such strained & unreasonable views "would make posterity think ill of our understanding," as Lord Chief Justice Holt once remarked. We would have to have the luck incident to being born with a caul (see David Copperfield) to escape such verdict in such hypothesis.

We will cite a few cases in point, others will be found in the reporter's headnotes to this opinion. (Garretzen v. Duenckel, 50 Mo. 104, a leading case often cited in this as well as in other jurisdictions; Perkins v. Railroad, 55 Mo. 201; Farber v. Railroad, 116 Mo. 81; Brill v. Eddy, 115 Mo. 201; Haehl v. Railroad, 119 Mo. 325; Farber v. Railroad, 139 Mo. 272).

Finally, we stress the fact that both sides by instructions submitted to the jury the question whether (1) the conductor kicked plaintiff off the train and (2) whether in so doing he was acting within his employment in the line of duty and about his master's business. Those were issues of fact for the jury, and were found by them for respondent. We have no authority to disturb their finding.

It provokes some interest in this connection to note that on appeal on the point raised on the petition for removal, appellants insist — Railway Company is alone liable and Drake was improperly joined. While on the merits on appeal they insist Drake alone is liable and it is not liable. Is that not facing both ways?

The point is ruled against appellants.

III.

Of Improper Expert Testimony.

In assigning error in that regard appellants neither in briefs or argument put their finger on any question or testimony afflicted with any vice. The laboring oar on appeal was on them to point out specific error. Trial courts are presumed to proceed by right and not by wrong. Their judgments are presumptively correct, and an appellant had as well take no appeal at all as to take one and fail to point out the spot and fact in which error is claimed to lurk. We have always applied that theory to alleged errors in giving instructions, ruling on testimony, raising constitutional points and the like. There was no little expert testimony and we might rule the point against appellants for failure to specify.

But, being left to our own resources, we have read that testimony critically and see no error affecting the merits.

IV.

Of Alleged Error in Instructions.

Under this head appellants assign error in two particulars—one in giving, one in refusing instructions.

31 (*a*) The court instructed the jury for respondent in part as follows:

1. "The court instructs the jury that if they believe from the evidence that on the 20th day of July, 1905, plaintiff, at or near the station of Lathrop, got upon a freight train of defendant, The Chicago, Rock Island & Pacific Railway Company, for the purpose of being transported from said station to Cameron, and that defendant Drake was at said time said railway company's conductor and servant on and in charge of said train; and if you further find from the evidence that while plaintiff was so on said train at said date, and while said train was running through or near the station of Turney, the defendant Drake, as such conductor and servant, while in charge of said train and in the line of his duties to said railway company, approached plaintiff and wrongfully and with great and unusual force and violence kicked; forced and ejected plaintiff from said train to the ground, whereby he was injured, then the defendants are liable in this case, and the jury will return a verdict for the plaintiff and against both of the defendants."

4. "The court instructs the jury that if they find for plaintiff, and against both the defendants, their verdict may be in the following form:

'We, the jury, find for plaintiff and against both of the defendants herein and assess his damages at — dollars.'"

We perceive no error in those instructions, the ones challenged. The point made is that the instruction includes both defendants. But if they found the facts hypotheseized in instruction number 1, then both defendants were guilty and the court did right in telling the jury to so find. Instruction number 4 followed inevitably as a sequence. It was left, then, to defendants to put any other allowable theory to the jury and this they did with the consent of the court, in part as follows:

1. "The court instructs the jury that if they shall find from the evidence that the defendant, F. M. Drake, was conductor on the train mentioned in the testimony and that he did not go out upon the top of the cars of said train while the same was going from the station of Lathrop to Cameron, you will find for the defendant, F. M. Drake."

3. "The court instructs the jury that the plaintiff was a trespasser on the train mentioned in the evidence and that the defendants, or either of them, owned him no duty or obligations as a passenger on such train."

4. "If the jury shall find and believe from the evidence that the

plaintiff was on said train, intending to alight at the station of Turney, and that he voluntarily alighted from said train while the same was in motion and was injured, you must find for the defendants."

32 5. "If the jury shall find and believe from the evidence that the plaintiff at or about the time claimed in the petition boarded the train, intending to ride to the station of Turney, and that when said train failed to stop at said station the plaintiff at or near the north end of said station of Turney voluntarily alighted from said train, you must find for defendants."

7. "The court instructs the jury that if they find from the evidence that the train mentioned in the evidence was a freight train, which, under the rules and directions of the defendant railway company, did not and was not permitted to carry passengers, and that the plaintiff got upon said train without the permission of the conductor thereof, then, in such case, he was not a passenger, but a trespasser on such train, and unless you shall find from the evidence that the conductor, F. M. Drake, the defendant herein, actually did kick the plaintiff from said train while the same was in rapid motion, you must find for both defendants."

16. "If the jury find from the evidence that the train on which the plaintiff was riding was a 'through freight', not ordinarily carrying passengers and not scheduled to stop at the station of Turney, you should find for the defendant railway company, unless it has been shown to your satisfaction by the evidence that the conductor of such train was required by his duties to said company to put off trespassers found thereon and that in this case the defendant, Drake, did while acting within the scope of his employment kick plaintiff from said train while in motion as mentioned in another instruction."

The jury were not coerced by those instructions to find against both unless both were liable.

(*b*) Appellants asked certain instructions which were refused. They, in some instances, involved the same propositions in instructions already given, in other instances they did not declare the law of the case. We will not reproduce them here.

The point is disallowed to appellants and with such ruling it follows that the judgment should be affirmed. It is so ordered.

Graves, Brown, Bond & Faris, J.J., concur. Woodson & Walker, J.J., dissent. Woodson, J., in an opinion filed.

HENRY LAMM, *C. J.*

STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of said Court, delivered in the foregoing entitled cause, on the 24th day of November 1913, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 10th day of March 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk.*
By —— ——, *D. C.*

33 In the Supreme Court of Missouri, Oct. Term, 1913.
In Banc.

(No. 16138.)

DANIEL C. WHITEAKER, Respondent,
v.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE, Appellants.

Dissenting Opinion by Woodson, J.

It is conceded by all parties to this suit, in both oral arguments and printed briefs, that the plaintiff was not a passenger upon the train of defendant at the time of his injury, but was a trespasser pure and simple. In fact, that was the theory upon which the case was tried below, and the circuit court so instructed the jury. Therefore the appellant owed him no duty as a passenger nor did its agents and servants in charge of the train.

The respondent's evidence tended to show, and if true, he was a trespasser upon the top of appellants' train, and when it reached Turney, he was seated on the top of the car, with his feet hanging over the side; that at that time the conductor of the train climbed up on the top of the car, approached respondent, and with a vile epithet, inquired what he was doing there, and without further ado, violently kicked him off of the top of the car.

I am firmly and unalterably of the opinion that those facts, even conceded to be true, do not render the appellant liable for the injuries thereby inflicted upon the respondent; and my reason for so holding is that the conductor was not acting within the scope of his employment, and therefore the doctrine of respondent superior does not apply.

And with all due respect for the opinion of my learned associate, I am firmly of the opinion that none of the cases cited in the majority opinion or in briefs of respondent so hold.

The case of Garretzen v. Duenckel, 50 Mo. 104, the case upon which all the others are based, while properly decided on the facts of that case, has no earthly application to the facts of the case at bar.

34 Suppose in that case, instead of Brewer, the clerk in the gun store, who in violation of his principal's orders, while showing the rifle to the customer, loaded it, and while so doing, accidently discharged the same and shot Garretzen, the plaintiff therein, he had, while showing it to the customer, observed Garretzon passing on the street, had loaded it, stepped to the door, and

with a vile epithet had shot him down, would it be supposed the court in that case would have held that Duenckel, the principal was liable for the injuries so inflicted? I apprehend not; and I dare say that there is not a case to be found in the books which so holds, but there are scores of them holding to the contrary.

Brewer, in that case, would have been a criminal and Duenckel would not have been responsible for the shooting. So in the case at bar, if Drake, the conductor, assaulted respondent in the manner and under the conditions the respondent claims he did, then he was not acting within the scope of his authority, but his acts were those of a criminal and he and not the railroad company should be punished therefor.

Jackson v. St. Louis, Iron Mountain & Southern R. Co. 87 Mo., 422, l. c. 430; Stringer v. Missouri Pacific Ry. Co. 96 Mo. 300; Faber v. Missouri Pacific Ry Co. 116 Mo. l. c. 93; Walker v. Hannibal & St. Joseph Ry. Co. 121 Mo. 575, l. c. 584.

Moreover it should be borne in mind that freight trains are not generally designated or used for the transportation of passengers, but are used in the transportation of dumb brutes and inanimate objects, and not human beings, and under those conditions it cannot and should not be presumed that Drake, the conductor, was acting within the scope of his employment, when he kicked the respondent from the car, especially when as we all know, that it is not only physically possible, but it frequently occurs that an employe like any other human being, while performing his ordinary duties, steps aside momentarily therefrom, and commits some of the most heinous crimes, which were never dreamed of by the principal when he employed him, much less, authorized or anticipated that he would commit such an act.

35 So, is as in the Jackson case, supra, the railroad company was not responsible for the unlawful act of the conductor in accepting a passenger against his will, then how much stronger is the reason for holding that the appellant in this case is not responsible for the unlawful act of Drake in kicking respondent from the train, who was not a passenger, and especially where Drake had no authority whatever, to represent the appellant in the transportation of passengers.

I therefore dissent from the majority opinion.

A. M. WOODSON, *J.*

STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the dissenting opinion of Woodson, J., in said Court, delivered in the foregoing entitled cause, on the 24th day of November 1913, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 10th day of March 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk.*
By —— ——, *D. C.*

36 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and FRANK DRAKE, Plaintiffs in Error,
vs.
DANIEL C. WHITEAKER, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States:

The petition of The Chicago, Rock Island and Pacific Railway Company and Frank Drake, respectfully shows, that on the 24th day of November, 1913, the Supreme Court of the State of Missouri, made and entered a final order and judgment therein in favor of the defendant in error, Daniel C. Whiteaker, and against your petitioners, in a certain cause wherein Daniel C. Whiteaker was plaintiff, and your petitioners, The Chicago, Rock Island and Pacific Railway Company and Frank Drake, were defendants, for $8,500.00 and for costs, as will appear by reference to the record and proceedings in said cause, in which final order and judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of The Chicago, Rock Island and Pacific Railway Company and Frank Drake, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Supreme Court of the State of Missouri is
37 the highest court of the said state of Missouri in which a decision in this suit and in this matter could be had.

And your petitioners claim the right to remove said final judgment to the Supreme Court of the United States by writ of error, under Section 709 of the Revised Statutes of the United States, reenacted as Section 237 of the Judicial Code, because the said Daniel C. Whiteaker, a citizen of the State of Missouri sought to recover from your petitioner, The Chicago, Rock Island and Pacific Railway Company, a corporation, organized and existing under and by virtue of the laws of the states of Illinois and Iowa, and which was at the time of the filing of said petition, and all times since has been, a citizen of the states of Illinois and Iowa, and not a citizen of the said State of Missouri, and its employe, Frank Drake, your petitioner, the sum of Fifteen Thousand ($15,000.00) dollars on account of the alleged assault upon the said Daniel C. Whiteaker by your petitioner, Frank Drake, while the said Daniel C. Whiteaker was upon a train of your petitioner, The Chicago, Rock Island and Pacific Railway Company. Your petitioner, The Chicago, Rock Island and Pacific Railway Company, in due time, as required by the statute of the United States, filed its verified petition for the removal of said cause to the proper district of the United States Circuit Court, said petition for removal being accompanied by a proper bond. In said petition for removal it was alleged that your pe-

titioner, Frank Drake, was not present at the time and place mentioned in the plaintiffs' petition; that the charge against your petitioner, Frank Drake, was wholly and fraudulently untrue, all of which was known to the plaintiff at the time of the institution of said suit, and that such untrue and fraudulent charge was
38 made against your petitioner, Frank Drake, for the sole and fraudulent purpose of defeating and preventing your petitioner, The Chicago, Rock Island and Pacific Railway Company from removing said suit to the United States Circuit Court. Said verified charge in the petition for removal was also supported by the affidavit of your petitioner, Frank Drake, and by the affidavit of C. L. Burger. Your petitioner, The Chicago, Rock Island and Pacific Railway Company, in presenting its said verified petition for removal, and its said affidavits in support thereof to the Circuit Court of Clinton County, Missouri, where said suit was instituted and pending, claimed that the allegations in the petition for removal raised questions of fact, among other things, which, upon the question of removal, should be taken as true by the state court. The said state court denied the petition of your petitioner, The Chicago, Rock Island and Pacific Railway Company, for the removal of said cause, to the United States Court. Upon the appeal of said suit to the Supreme Court of Missouri, your petitioner renewed its said claim that the allegations of fact in its petition for removal entitle it to a removal of said suit to the United States Court, which contention the said Supreme Court of Missouri denied, all of which appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri and the judges thereof, to the end that the record in said matter may be removed into the Supreme
39 Court of the United States, and the error complained of by your petitioners may be examined and corrected and said judgment and your petitioners discharged; and for citation and supersedeas; and your petitioners will ever pray.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND FRANK DRAKE,
Petitioners,
By PAUL E. WALKER,
F. C. DILLARD,
Attorneys for Petitioners.

February 27, 1914.
Writ of error allowed.

WILLIS VAN DEVANTER,
Associate Justice.

39½ [Endorsed:] Petition. Filed M'ch 3rd, 1914. J. D. Allen, Clerk.

40 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and FRANK DRAKE, Plaintiffs in Error,
vs.
DANIEL C. WHITEAKER, Defendant in Error.

Assignment of Errors.

The plaintiffs in error in the above entitled cause, The Chicago, Rock Island and Pacific Railway Company and Frank Drake, in connection with their petition for a writ of error herein, present and file therewith this their assignment of errors, as to which matters and things they say that the decision and final judgment of the Supreme Court of the State of Missouri entered therein on the 24th day of November, 1913, is erroneous, to-wit:

First. The court erred in holding that The Chicago, Rock Island and Pacific Railway Company was not entitled under the act of Congress approved March 3, 1887, (24 Stat. 552) as corrected by the act of August 13, 1888 (25 Stat. 433), to have said cause removed for trial to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

Second. The court erred in holding that the provisions of said acts did not entitle The Chicago, Rock Island and Pacific Railway Company, the above named plaintiff in error, to have said cause transferred to and heard and determined in the Circuit Court of the United States for the St. Joseph Division of the Western
41 District of Missouri.

Third. The court erred in holding that the Circuit Court of Clinton County, Missouri, had jurisdiction to try and determine said cause, notwithstanding the fact that the above named defendant in error, Daniel C. Whiteaker, was a citizen at the time of the commencement of said cause, and all times since has been and still is a citizen of the State of Missouri, during all of which times the plaintiff in error, The Chicago, Rock Island and Pacific Railway Company, was, and at all times since has been a corporation organized and existing under and by virtue of the laws of the states of Illinois and Iowa, and a citizen of said states, and notwithstanding the fact that a proper bond had been furnished and the amount in controversy exceeded exclusive of interest and costs the jurisdictional amount provided for in said acts of Congress.

Fourth. The court erred in holding that the provisions of the said acts of Congress did not entitle the above named plaintiffs in error, The Chicago, Rock Island and Pacific Railway Company and Frank Drake, to have said cause transferred for trial to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, under the terms and provisions of the Act of Congress approved March 3, 1887, as corrected by the Act of August 13, 1888, providing for the removal of cases from state courts to United States courts for trial and disposition.

Fifth. The court erred in ordering judgment to be entered against the plaintiffs in error, The Chicago, Rock Island and Pacific Railway Company and Frank Drake, or either of them.

42 Wherefore, the plaintiffs in error, The Chicago, Rock Island and Pacific Railway Company and Frank Drake, pray that said decision and final judgment may be reversed, and that said plaintiffs in error have an adjudication and decree in their favor as herein specified.

PAUL E. WALKER,
F. C. DILLARD,
Attorneys for Plaintiffs in Error, The Chicago, Rock Island and Pacific Railway Company and Frank Drake.

42½ [Endorsed:] Assignment of errors. Filed M'ch 3rd, 1914. J. D. Allen clerk.

43 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and FRANK DRAKE, Plaintiffs in Error,
vs.
DANIEL C. WHITEAKER, Defendant in Error.

Know all men by these presents, That we The Chicago, Rock Island and Pacific Railway Company and Frank Drake, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto Daniel C. Whiteaker in the sum of Twelve Thousand Five Hundred dollars to be paid to the said obligee his successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of February, 1914.

Whereas, the above named appellant The Chicago, Rock Island and Pacific Railway Company and Frank Drake have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Missouri.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error, The Chicago, Rock Island and Pacific Railway Company and Frank Drake shall prosecute their said writ of error to effect and answer all costs and damages rendered, and to be rendered in case the decree shall be affirmed, and if they shall fail to make good their plea in said Supreme
44 Court, then this obligation shall be void; otherwise to remain in full force and effect.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
By PAUL E. WALKER,
Its Agent and Attorney.
FRANK DRAKE.

[Seal American Surety Company of New York.]
AMERICAN SURETY COMPANY OF NEW YORK,
By R. E. VALENTINE, *Agent.*

Attest:
ROBERT S. KING,
Resident Ass't Secretary.

STATE OF KANSAS,
County of Shawnee, ss:

On this 9th day of January 1914, personally appeared before me, Paul E. Walker, who being duly sworn deposes and says, that he is the Agent and Attorney of The Chicago, Rock Island and Pacific Railway Company, and as such Agent and Attorney is authorized to sign the foregoing instrument, and that the said Paul E. Walker acknowledged the said instrument to be the free act and deed of said corporation.

[SEAL.] L. L. COLLINS,
Notary Public.

My commission expires Sept. 1, 1914.

February 27, 1914. Bond approved. Willis Van Devanter, Associate Justice.

45 STATE OF MISSOURI,
County of Jackson, ss:

On this 10th day of January, 1914, personally appeared before me R. E. Valentine who being duly sworn, deposes and says, that he is the Agent and Resident Vice President for the American Surety Company of New York; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and the said R. E. Valentine acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] JESSIE M. HAMPEL,
Notary Public, Jackson County, Missouri.

My commission expires April 24, 1916.

45½ [Endorsed:] Bond. Filed Mch. 3rd, 1914. J. D. Allen, Clerk.

46 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and FRANK DRAKE, Plaintiffs in Error,
vs.
DANIEL C. WHITEAKER, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said Supreme Court of the State of Missouri, before you, or some of you, being the highest court of law or equity of the said state in which a decision could

be had in the said suit between Daniel C. Whiteaker and The Chicago, Rock Island and Pacific Railway Company and Frank Drake, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was
47 against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; and a manifest error hath happened to the great damage of the said The Chicago, Rock Island and Pacific Railway Company and Frank Drake, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington filed in the office of the Clerk of the Supreme Court of the United States within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States this 27th day of February in the year of our Lord, One Thousand, Nine Hundred and Fourteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

February 27, 1914.

Allowed by:

WILLIS VAN DEVANTER,
Associate Justice.

47½ [Endorsed:] Writ. Filed Mch. 3rd, 1914. J. D. Allen, Clerk.

48 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and FRANK DRAKE, Plaintiffs in Error,
vs.
DANIEL C. WHITEAKER, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To Daniel C. Whiteaker, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the date hereof pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Missouri, wherein The Chicago, Rock Island and Pacific Railway Company and Frank Drake are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, The Chicago, Rock Island and Pacific Railway Company and Frank Drake, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States this 27th day of February 1914.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

A copy of the within citation is received this 5th day of March, 1914.

PROSS T. CROSS,
Attorney of Record for Defendant in Error, Daniel C. Whiteaker.

48½ [Endorsed:] Citation. Filed Mch. 3rd, 1914. J. D. Allen, Clerk.

49 STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that on the 3rd day of March, 1914, there was filed in this office, a petition for a writ of error from the Supreme Court of the United States, together with its allowance; assignment of errors; a Bond in the sum of Twelve Thousand Five Hundred Dollars approved by Mr. Justice Van Devanter; Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, with the allowance thereof; a citation from the Supreme Court of the United States with service thereon, in the case of Daniel C. Whiteaker, v. Chicago, Rock Island and Pacific Railway Company and Frank M. Drake, all of which above named

papers are attached to and made a part of the foregoing transcript of record.

In testimony whereof, I hereunto set my hand and affix the seal of the said Supreme Court of Missouri. Done at office in the City of Jefferson, this 10th day of March, A. D. 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

50 In the Supreme Court of Missouri.

No. 16138.

DANIEL C. WHITEAKER, Respondent,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and FRANK M. DRAKE, Appellants.

Præcipe for the Preparation of a Transcript of the Record.

To J. D. Allen, Clerk of the Supreme Court of Missouri:

In the preparation of a transcript of the record in the above entitled cause in compliance with the writ of error, directed to the Supreme Court of the State of Missouri, by the Supreme Court of the United States, you will please insert the following portions of the record, and the following papers now on file in your office:

1. That part of appellants' abstract of the record in the above entitled cause, beginning with the words "On May 2, 1908," on page one of said abstract of the record, and ending with the words "Attorney for Plaintiff," at the bottom of page four of said abstract of the record.

2. Beginning with the first word at the top of page five of the said abstract of the record, and including all of the first paragraph on said page, and all of the first sentence of the second paragraph on said page, ending with the words "and still excepts."

51 3. Beginning with the words, "Petition for Removal to the United States Circuit Court," on page six of said abstract of the record, and including all of said abstract of the record following thereafter, down to and including the words "And on said day the said bond was by the court duly approved," on page thirteen of said abstract of the record.

4. All of page fourteen of said abstract of the record, and all of page fifteen of said abstract of the record, down to and including the words "My commission expires March 20, 1910."

5. All of page sixteen, and all of page seventeen of said abstract of the record.

6. Beginning with the words "On January 13, 1910" on page twenty-one of said abstract of the record, and including all of the remainder of page twenty-one and the first two lines of page twenty-two, ending with the words "execution issue therefor."

7. The opinion of the Supreme Court of Missouri in the above entitled cause.
8. Original petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, together with its allowance in the above entitled cause.
9. Original assignment of errors.
10. A copy of a bond and its approval by Mr. Justice Van Devanter.
11. The original writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, with the allowance thereof.

52 12. The original citation with service thereon.
13. Certificate of lodgment.
14. Præcipe for the preparation of the transcript.
15. Authentication of record.
16. Return to writ of error and statement of costs.

PAUL E. WALKER,
Attorney for Appellants.

I, Pross T. Cross, Attorney of Record for Daniel C. Whiteaker, respondent in the above entitled cause, hereby acknowledge service of the præcipe for the preparation of a transcript of the record in the above entitled cause.

PROSS T. CROSS,
Attorney of Record for Daniel C. Whiteaker.

52½ [Endorsed:] Præcipe. Filed Mch. 10/14. J. D. Allen, Clerk.

53 STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the record, in the case of Daniel C. Whiteaker, Respondent v. The Chicago, Rock Island and Pacific Railway Company and Frank M. Drake, Appellants, required by the pr*e*acipe filed herein.

In Testimony Whereof, I hereunto set my hand and affix the seal of our said Supreme Court. Done at my office in the City of Jefferson, this 10th day of March, 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

54 DANIEL WHITEAKER, Respondent,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and FRANK M. DRAKE, Appellants.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing contains a full, true and complete transcript of all papers filed in the above entitled cause, as called for in the præcipe filed herein, as fully as the same remain on file in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of our said Supreme Court of the State of Missouri. Done at my office in the City of Jefferson, this 11th day of March, 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

55 In the Supreme Court of Missouri.

No. 16138.

DANIEL C. WHITEAKER, Respondent,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK M. DRAKE, Appellants.

Præcipe for Preparation of Transcript of the Record (by Respondent).

To J. D. Allen, Clerk of the Supreme Court of Missouri:

In the preparation of a transcript of the record in the above entitled cause, in compliance with the writ of error issued from the Supreme Court of the United States, you will please insert the following parts and portions of the record and papers now on file in your office in said cause, in addition to the records and papers and parts thereof called for by appellants in their præcipe filed in your office:

1. A copy of the judgment and order of the Supreme Court of Missouri rendered on the 24th day of November, 1913, affirming the *the* judgment of the Circuit Court of Clinton County, in the above entitled cause, setting out especially the date of the said affirmance.

2. A copy of the order, decree, judgment or mandate together with the date of the rendition thereof, of the Supreme Court of Missouri, rendered in the above entitled cause.

3. A copy of the mandate and the date of same, as sent to the clerk of the Circuit Court of Clinton county.

4. A certificate of the status of the record showing whether or not a motion for rehearing was filed in said cause by either party, in the Supreme Court of Missouri.

5. Date of lodgment of writ of error and Bond.

PROSS T. CROSS,
Attorney for Respondent.

[Endorsed:] Filed Mar. 12 1914. J. D. Allen, Clerk.

56 In the Supreme Court of Missouri, October Term, 1913.

Be it remembered, that on November 24th, 1913 the following proceedings were had and entered of record, in the case of Daniel Whiteaker, Resp., v. The Chicago, Rock Island and Pacific Railway Company and Frank M. Drake, Appellants, as follows, to-wit:

"DANIEL C. WHITEAKER, Respondent,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE, Appellants.

Appeal from the Circuit Court of Clinton County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge, that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Clinton County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant his costs and charges herein expended and have therefor execution (Opinion filed)."

57 In the Supreme Court of Missouri, October Term, 1913.

DANIEL C. WHITEAKER, Respondent,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE, Appellants.

Appeal from the Circuit Court of Clinton County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Clinton County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellants his costs and charges herein expended and have therefor execution. (Opinion filed.)

58 In the Supreme Court of Missouri.

DANIEL C. WHITEAKER, Respondent,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE, Appellants.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete copy of the mandate sent to the Clerk of the Circuit Court of Clinton County, on or about the 5th day of December, 1913, in the above entitled cause.

In Testimony Whereof, I hereunto set my hand and affix the seal of our said Supreme Court, this 12th day of March, 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

59 In the Supreme Court of Missouri.

DANIEL C. WHITEAKER, Respondent,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE, Appellants.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that no motion for rehearing was ever filed in this Court, by either party, in the above entitled cause.

In Testimony Whereof, I hereunto set my hand and affix the seal of our said Supreme Court, this 12th day of March 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

60 In the Supreme Court of Missouri.

DANIEL C. WHITEAKER, Respondent,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE, Appellants.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that on the 3rd day of March, 1914, there was lodged in this

office a writ of error from the Supreme Court of the United States to the State of Missouri, with allowance thereon by Mr. Justice Van Devanter; and a Bond in the sum of Twelve Thousand Five Hundred Dollars, approved by Mr. Justice Van Devanter; which said original writ of error and copy of said bond are attached to the foregoing transcript and made a part thereof.

In Testimony Whereof, I hereunto set my hand and affix the seal of our said Supreme Court, this 12th day of March, 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

61 JEFFERSON CITY, Mo., March 18, 1914.

Mr. Paul E. Walker, Topeka, Kansas.

To J. D. Allen, Clerk of the Supreme Court, Dr.

Mch. 18/1914.	To transcript in the case of Daniel C. Whiteaker vs. The Chicago, Rock Island & Pacific Railway Company and Frank M. Drake	31.50
	To Binding	1.00
	To express	.25
		$32.75

Paid 3/18/14. J. D. Allen, Clerk.

Endorsed on cover: File No. 24,125. Missouri Supreme Court. Term No. 111. The Chicago, Rock Island & Pacific Railway Company and Frank Drake, plaintiffs in error, vs. Daniel C. Whiteaker. Filed March 23d, 1914. File No. 24,125.

20

Office Supreme Court, U. S.
FILED
NOV 20 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

October Term, 1915.

No. 111.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND FRANK DRAKE, *Plaintiffs in Error,*

vs.

DANIEL C. WHITEAKER, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR PLAINTIFFS IN ERROR.

PAUL E. WALKER,
M. L. BELL,
Attorneys for Plaintiffs in Error.

CRANE & CO., TOPEKA

IN THE

Supreme Court of the United States.

October Term, 1915.

No. 111.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND FRANK DRAKE, *Plaintiffs in Error,*

vs.

DANIEL C. WHITEAKER, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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The Question for Determination in this Case is whether the Petition for the Removal of the Suit to the United States Court Should Have Been Allowed.

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IN THE

Supreme Court of the United States.

October Term, 1915.

No. 111.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND FRANK DRAKE, *Plaintiffs in Error,*

vs.

DANIEL C. WHITEAKER, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

On May 2, 1908, Daniel C. Whiteaker, the defendant in error, filed a petition in the Circuit Court of Clinton County, Missouri, in which he alleged that while riding on top of a box car in a freight train, at the invitation of one of the employes upon said train, he was kicked therefrom

by Drake, the plaintiff in error, who was at that time in charge of the train as conductor for The Chicago, Rock Island and Pacific Railway Company, the other plaintiff in error. The petition further alleged that the plaintiff boarded the train at Lathrop, Missouri, with the intention of riding to Cameron, Missouri, and that he was kicked from the train, as aforesaid, near the station of Turney, Missouri, intermediate between Lathrop and Cameron. (Transcript, 1–2.)

Within the proper time the plaintiff in error, The Chicago, Rock Island and Pacific Railway Company, filed a verified petition for removal, alleging that the plaintiff was a citizen of Missouri; that the amount in controversy exceeded the jurisdictional amount; that the Railway Company was a foreign corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa; that the petition contained a separable controversy between the plaintiff and the Railway Company, which could be fully determined as between them, and the whole subject matter of the suit finally determined as between them and complete relief afforded without the presence of the defendant, Drake. It was further alleged in the petition for removal that the de-

fendant, Drake, was joined as a defendant by the plaintiff for the sole and fraudulent purpose of defeating and preventing the Railway Company from removing the case to the Federal court; that the plaintiff did not have and could not have had at the time of the institution of the suit any cause of action against the defendant, Drake, or any reasonable ground upon which to base a cause of action or upon which to base a recovery against him, all of which was known to the plaintiff at the time of the institution of the suit. It was further alleged in the petition for removal that the defendant Drake "was not present at the time and place mentioned in plaintiff's petition, all of which was known to the plaintiff at the time of the institution of the suit." (Transcript, 3–5.) As a part of the petition for removal the defendant Railway Company filed two affidavits, one by C. L. Burger, the rear brakeman on the train in question, and the other by the defendant, Drake. These affidavits set forth the following facts:

That at the station of Lathrop where the plaintiff alleges he boarded the train, the defendant, Drake, who was at that time riding in the caboose attached to the train in question where his duties required him to be, went down the steps of the caboose, stepped upon the platform long enough

to receive a train order, and immediately re-entered the caboose; that the train left the station of Lathrop immediately; that between the said station of Lathrop and the station of Cameron the defendant, Drake, was not outside of the caboose, but that during the entire time he was busy at his desk in the caboose with his train work; that at no time while the train was between the stations of Lathrop and Cameron was the defendant on top of the train; that the defendant, Drake, attempted to make no ejectments from the train; that he did not know the plaintiff; that he never saw him until after the institution of this suit, and that he never heard of the alleged occurrence until a considerable time after it was alleged to have occurred. (Transcript, 7–8, 8–9.) The petition for removal was accompanied by a bond sufficient in amount and conditioned according to law. (Transcript, 6.)

The state court approved the bond, but refused to sustain the petition for removal, over the objection and exception of the plaintiffs in error. (Transcript, 3.) Subsequently the Supreme Court of Missouri affirmed this ruling on the ground that the petition upon its face stated a joint cause of action, and that the motive of the plaintiff in joining the resident defendant was of no consequence. *Whiteaker v. Chicago, R. I. & P. Ry. Co.*, 160 S. W. Rep. 1009, 252 Mo. 438. (Transcript, 10–13.)

SPECIFICATION OF ERRORS.

The Circuit Court of Clinton County, Missouri, and the Supreme Court of the State of Missouri erred in refusing to order the removal of the suit to the United States Court.

BRIEF AND ARGUMENT.

The petition for removal and the accompanying affidavits raised questions of fact which could be determined only by the Federal court after the suit had been removed, and which, for the purposes of removal, should have been taken as true by the State court.

The trial court, although considering the allegations of fact in the petition for removal as well as those contained in the affidavits presented therewith, *ignored the question of fact presented*, and in its opinion, the Supreme Court of the State of Missouri did likewise. The Supreme Court of Missouri held in substance that as the petition on its face stated a joint cause of action, and as there was no question respecting the citizenship of the defendant, Drake, the cause was not removable. The court says:

"The ruling below was right, because: It was for plaintiff, not defendant, to elect who should be sued on a joint liability sounding in tort. When a plaintiff sues both corporate master and individual servant on a liability that appears on the face

of his petition to be joint, the cause is not removable to the Federal court, although the master be a non-resident and not a citizen of the State, where, as here, the servant is a resident and citizen of the State. The presence of the resident citizen, as a party defendant, carries the case outside of the intendment of the Federal statute.

"If there had been a question of fact on Drake's citizenship and residence we might have had a different question to deal with. So, if the negligence of the servant had been a mere act of nonfeasance instead of one of misfeasance, as it was, there might have been a different question. So, if the petition had disclosed any other liability against the master and not against the servant.

"The question whether a removal should go always harks back to the allegations of plaintiff's statement of his cause of action in his petition. Removability, in that feature of it, becomes a mere question of law, with which it was the duty and right of the state court to deal in the first instance. If the controversy as stated raised a joint liability and was not on the face of the petition separable, an inquiry into the secret motives of plaintiff in joining defendants and seeking a recovery from both, such as defendant here rely on, is of no efficacy in determining either jurisdiction or liability."

In support of this ruling the court cites its own decisions in cases where the question presented was whether the petition on its face stated a joint cause

of action. The court also relies upon the decision of this court in *Chicago, R. I. & P. Ry. Co. v. Schwyhart*, 227 U. S. 184, in support of its ruling. In that case this court held simply that as the State court had held that the petition stated a joint cause of action on its face this court would not attempt to go behind that decision, and that the motive of the plaintiff in joining the resident defendant was immaterial. Neither in this case, nor in any of the cases cited by the Supreme Court of Missouri was the question considered as to *where questions of fact arising upon a petition for removal should be decided.*

The petition in the case at bar on its face stated a joint cause of action, and if there had been no allegations of fact substantiating the charge that the joinder was fraudulent and false, the denial of the removal would have been proper. The question at issue, however, and the one which the Supreme Court of Missouri ignored, was whether, admitting the truth of the facts alleged in the petition for removal and the accompanying affidavits, a case for removal was presented.

The petition charged that while the plaintiff was riding on the top of a box car between the stations of Lathrop and Cameron, and while near

the intermediate station of Turney, the defendant, Drake, approached him and kicked him from the top of the train. The petition for removal charged that the allegations, so far they related to the defendant Drake, were both fraudulent and false and made for the purpose of preventing the defendant Railway Company from removing the case to the Federal court. The petition for removal then alleged that the defendant Drake was not present at the time and place alleged in plaintiff's petition, which fact was known to the plaintiff when the suit was brought. In support of these allegations and as a part of the petition for removal, two affidavits were filed, one by the rear brakeman on the train in question and the other by the defendant, Drake, himself. These affidavits set forth as matters of fact that when the train in question reached the station of Lathrop, where the plaintiff alleged he boarded the train, the defendant, Drake, who was then riding in the caboose attached to the train, went down the steps of the caboose, stepped upon the platform long enough to receive a train order and immediately re-entered the caboose where his duties required him to be, and remained in the caboose at all times until after the train reached Cameron,

a considerable time after the alleged accident to the plaintiff; that the plaintiff was not on or about the caboose in which the defendant, Drake, was riding; that the alleged accident and assault were not heard of until long after their alleged occurrence. These allegations and the facts in support thereof were not conclusions of law, nor allegations as to what the facts would show. They were statements of distinct facts, and so far as the State court was concerned, conceded to be true. A petition for removal is a pleading, and under the general rules respecting the construction of pleadings, it was the duty of the petitioner to state such facts as would enable a court to determine, as a matter of fact, the circumstances relied upon. It would be difficult to presuppose a situation where a statement of facts showing that the joinder of a resident defendant was fraudulent, was more clearly and unequivocally pleaded. A simple and conclusive test of the sufficiency of the allegations of the petition for removal and the accompanying affidavits is whether or not such facts, if pleaded in an answer, would have been subject to demurrer on the ground that, as a matter of law and being admitted to be true, they would not be a defense so far as the defend-

ant, Drake, is concerned. Such is the test applied by Mr. Chief Justice WAITE in *Little York Gold Washing and Water Co. v. Keyes*, 96 U. S. 199. For example, if the plaintiff had sued the defendant, Drake, for assault and the defendant, Drake, had answered, setting forth the facts contained in the petition for removal and the accompanying affidavits, no one would seriously contend that such an answer would be demurrable. Their sufficiency is shown by another example equally conclusive. If the State court had granted the removal, and on motion to remand in the Federal court it had been conceded by the plaintiff that the facts alleged in the petition for removal and the accompanying affidavits were true, the same as the law presumes them to be when presented to the State court, it is not within the range of possibilities that the Federal court would have sustained the motion to remand.

If the State court had granted the removal and the plaintiff in the Federal court had filed a motion to remand without taking direct issue on the facts alleged in the petition for removal and accompanying affidavits, the motion to remand would have been but the filing of a demurrer which would have raised only the legal question,

whether upon the facts stated in the petition for removal and accompanying affidavits a case for removal was made out. *Kentucky v. Powers*, 201 U. S. 1, 33–35; *Dishon v. Cincinnati, N. O. & T. P. Ry. Co.*, 133 Fed. Rep. 471; *Hunter v. Illinois Central R. Co.*, 188 Fed. Rep. 645, 649; *Gibson v. Chesapeake & O. Ry. Co.*, 215 Fed. Rep. 24, 26. For the purposes of such a motion the facts alleged would have been admitted, and it is not too much to say that a motion to remand under such circumstances would certainly have been denied.

"The State court has no power to try questions of fact arising upon the petition; but must accept the facts therein alleged as true."

Foster: Federal Practice, 5th Ed. Sec. 554.

What were the facts in this case which the State court was bound to accept as true in considering the question of removal:

1. That the defendant, Drake, was not present upon the train at the place where the assault is alleged to have been committed, at any time while the plaintiff was upon the train.

2. That at no time while the plaintiff was upon the train was the defendant, Drake, in a position or in a place where he could have committed the assault.

3. That the plaintiff knew these facts when the petition was filed.

4. That the plaintiff, notwithstanding these facts, joined the defendant, Drake, as a defendant, not for the purpose of securing a recovery against him, but for the sole purpose of denying the defendant Railway Company the right to remove the case to the Federal court.

A more complete and a plainer case of falsehood and fraud could not be stated.

In holding that the question for determination was confined to the consideration of whether the petition on its face stated a joint cause of action, the Missouri courts ignored the long and well settled rule to the contrary.

The rule is clearly stated in Black's Dillon on Removal of Causes, Sections 76, 191, where the author says:

"It is not in the power of a plaintiff, when proceeding against a defendant whose citizenship is such as to give him the right of removing the cause to the Federal court, to prevent such removal by improperly or fraudulently joining with him, as defendants, parties who have no real or substantial interest in the litigation and who would not have the right of removal. When this is attempted, the proper course for the defendant is to apply for a removal of the cause and to set out fully, in his

petition, the facts upon which he relies. It will then be open to the plaintiff to join issue upon the facts so alleged; and thereupon the Federal court will hear the evidence and decide accordingly. . . .

"In the first place it is settled beyond any manner of doubt that questions of fact arising upon an application for the removal of a cause are to be tried and determined in the Federal court alone. Issues of fact upon the petition cannot be raised in the State court. That court must take the facts to be as they are stated in the record and the petition; it has no jurisdiction to pass upon any such questions; that is the exclusive province of the Federal court."

The same rule is laid down in Moon on the Removal of Causes, Section 177, as follows:

"The later decisions deny to the State court all authority to inquire into the truth of the facts alleged in the petition for removal. Its statements of the facts of the case, no matter whether true or false, must be accepted as true by the State court. The plaintiff may, in the Circuit Court of the United States, question the truth of the petition for removal; but he cannot be heard to do so in the State court."

In the early case of *Stone v. South Carolina*, 117 U. S. 430, 432, Mr. Chief Justice WAITE said:

"All issues of fact made upon the petition for removal must be tried in the Circuit Court, but

the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. If it decides against the removal and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under Section 709 of the Revised Statutes."

And in *Carson v. Hyatt*, 118 U. S. 279, 287, Mr. Chief Justice WAITE again said that, "all issues of fact made upon the petition for removal must be tried in the Circuit Court." And held that, "the State court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further." In applying the court's further remarks in that case to the situation now before the court, it appears that the petition and exhibits stated in positive terms that the resident defendant was not and could not have been present at the time of the occurrence in question. "With that fact established, the necessary" elements "for a removal existed." Whether it was a fact or not, could only be tried in the Federal court.

In *Burlington, C. R. & N. Ry. Co. v. Dunn*, 122 U. S. 513, 515, 516, suit was brought against the railway conpany in a court of Minnesota by the plaintiff to recover for personal injuries which he

had received while traveling as a passenger. The railway company filed a verified petition for removal, alleging that it was an Iowa corporation and that the plaintiff was a citizen of Minnesota. Immediately upon the presentation of the petition for removal the attorney for the plaintiff filed a counter affidavit to the effect that the plaintiff was not a citizen of Minnesota, but of the territory of Montana. Upon this record the State court ruled that a case for removal had not been made out, which ruling was affirmed by the Supreme Court of the state. In reversing the judgment of the Supreme Court, Mr. Chief Justice WAITE, said:

"The assignment of errors presents but a single question, and that is whether, as after the petition for removal had been filed the record showed on its face that the State court ought to proceed no further, it was competent for that court to allow an issue of fact to be made upon the statements in the petition, and to retain the suit because on that issue the railway company had not shown by testimony that the plaintiff was actually a citizen of Minnesota."

After calling attention to the rule laid down in *Stone v. South Carolina*, *supra*, and *Carson v. Hyatt*, *supra*, this court proceeded:

"The theory on which it rests is, that the record

closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the State court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the State court has the right to decide for itself, and if it errs in keeping the case, and the highest court of the State affirms its decision, this court has jurisdiction to correct the error, considering for that purpose, only the part of the record which ends with the petition for removal."

The case at bar comes squarely within this rule. If the resident defendant was not as a matter of fact present upon the top of the train where the transaction in question took place, he could not have been connected therewith. These facts being alleged and uncontroverted presented to the State court a pure question of law, and that was whether, admitting the allegations stated in the petition for removal and the affidavits to be true, it appeared by the record, which included the petition for removal and the affidavits and the complete record on file down to that time, that the resident defendant was not a proper party de-

fendant, and that, as alleged in the petition for removal, he had been joined as a defendant for the purpose of fraudulently denying a constitutional right of the Railway Company.

In the recent case of *Texas and Pacific Ry. Co. v. Eastin*, 214 U. S. 153, 159, Mr. Justice McKenna, citing *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, held that where the facts stated in the petition for removal show a cause properly removable from a State to a Federal court the State court has no jurisdiction to pass finally upon them; that right is only for a Federal court, it having the exclusive province of passing upon such questions of fact.

In *Iowa Central Ry. Co. v. Bacon*, 236 U. S. 305, 310, Mr. Justice Day, said:

"In *Traction Company v. Mining Company*, 196 U. S. 239, this court said, citing many previous cases, that certain principles relating to the removal of causes had been settled by the former adjudications of the court. One is that if the suit be one in which the Circuit court could rightfully take jurisdiction, then upon the filing of the petition for removal in due time, with sufficient bond, the case is in law removed, and the State court loses jurisdiction to proceed further and all subsequent proceedings therein are void.

And in the recent case of *Chicago, R. I. & P.*

Ry. Co. v. Dowell, 229 U. S. 102, 113, Mr. Justice LURTON again stated the rule in the following language:

"Allegations of fact, if controverted, arising upon such a petition, are triable, only in the court to which it is sought to be removed."

In *Rea v. Standard Mirror Co. et al.*, 73 S. E. Rep. 116, the petition for removal charged that the resident defendant had been joined fraudulently for the purpose of preventing a removal, and with respect to the resident defendant alleged:

"That he was not present or in the factory when the plaintiff was injured; that the injury received was neither the direct nor proximate cause or result of any negligence of defendant Wineskie, nor of any duty imposed upon him, nor of the failure on his part to use due care, caution, or prudence, and properly discharge his duties, which are and were at and before the alleged injury of plaintiff, in the office of said company."

Considering these allegations, the Supreme Court of North Carolina, said:

"Upon these the controlling facts relevant to the question presented, we are of opinion that the order for removal was properly made. . . . where the petition for removal, properly verified as in this case, and accompanied by proper and sufficient bond, has been filed in the State court,

and the same contains allegation of fraudulent joinder, together with full and direct statement of the facts and circumstances of the transactions, sufficient, if true, to demonstrate that there had been such fraudulent joinder of the resident defendant, in such case, the order for removal should be made, and the jurisdiction of the State court is at an end. If the plaintiff desires to challenge the truth of these averments, he must do so on motion to remand or other proper procedure in the Federal court. That court, being charged with the duty of exercising jurisdiction in such case, must have the power to consider and determine the facts upon which the jurisdiction rests."

The allegations of the petition for removal in the case now presented are similar and the plaintiffs in error are entitled to the application of the same rule of law.

In the language of Circuit Judge ADAMS in *Donovan v. Wells, Fargo & Co.*, 169 Fed. Rep. 363, 366, 368:

"Such a petition [petition for removal] presents for the consideration of the State court a question of law only, whether, assuming the facts stated in the petition to be true, the face of the record discloses a removable cause under the law. . . . When the right of removal is made to depend upon the existence of certain facts, they must be taken by the State court to be true as averred in the petition. If it is desired to controvert such

facts or any of them, the plaintiff must make an issue with respect to them in the Federal court, and that issue must be tried in that court, . . . When issue is joined on allegations of the petition for removal, and not till then, the burden of establishing the affirmative thereof rests upon the petitioner."

In *Hunter v. Illinois Central R. Co.*, 188 Fed. Rep. 645, 648, a joint action was brought against the railroad company and one of its employes, a citizen of the same state as the plaintiff. The railroad company, a foreign corporation, in its petition for removal, charged that the allegations of negligence respecting the resident defendant were untrue, with the knowledge of the plaintiff when the suit was commenced; that the resident defendant was in no way connected with the transaction, but that he was made a defendant for the fraudulent purpose of preventing a removal. In holding that these allegations of fact entitled the railroad company to a removal, Circuit Judge Knappen, said:

"If the facts alleged in the petition for removal were true, the State court had no jurisdiction over the case. It follows that a cause for a removal was stated on the face of the petition therefor. . . . The questions of fact asserted in the re-

moval petition were not triable in the State court. That court could only consider whether the petition upon its face showed a right of removal."

In *Gibson v. Chesapeake & O. Ry. Co.*, 215 Fed. Rep. 24, 26, suit was brought against the railway company and two of its employes, who were citizens of the same state as the plaintiff, to recover damages resulting from the death of the plaintiff's husband. The petition for removal charged that,

"Neither of the individual defendants had anything whatever to do with the accident, it being alleged that one of them was not even present when it occurred, and the other, while in the employ of defendant in error, had no part or parcel in the accident."

Circuit Judge KNAPPEN, speaking for the court, held that "cause for removal was stated on the face of the petition therefor, through the express allegations of fraudulent joinder."

In *Boatmen's Bank v. Fritzlen*, 75 Kan. 479, 488, 489, the petition for removal alleged that certain acts were fraudulently performed for the purpose of defeating the right to remove. In holding that these allegations of fact respecting the incidents charged to be fraudulent were matters which

raised questions of fact to be determined by the Federal court only, Chief Justice JOHNSTON said:

"The averments in the petition for removal as to the bad faith and fraudulent purposes of Weldon and Fritzlen, when accepted as true, make out a prima facie showing of an attempt to evade the jurisdiction of the Federal court. . . .

"The averments as to fraud as well as all issues of fact raised by the petition for removal are to be tried in the Federal court alone. On a petition for removal the only question for a State court to decide is one of law; that is, whether, admitting the facts alleged in the petition and disclosed by the record to be true, the applicant has a right to a removal."

When this same case was pending in the Federal court (*Boatmen's Bank v. Fritzlen*, 135 Fed. Rep. 650, 653) before Mr. Justice VAN DEVANTER, then Circuit Judge, Circuit Judge SANBORN and District Judge PHILIPS, it was said:

"If issues of fact arise upon the averments of the petition for removal, the jurisdiction to try them is in the Federal court, and not in the State court."

The reasoning of these cases was approved by this Court in *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 373.

It is not important that a decision upon the questions of fact raised in the petition for re-

moval and the accompanying affidavits might ultimately be determinative of the question of recovery against the defendant, Drake. And it cannot be claimed successfully that the purpose was simply to try the case on its merits so far as the defendant, Drake, was concerned. The only question for consideration was whether the Railway Company had the right to remove to the Federal court, and the Railway Company had the constitutional right to have its allegations of fact with respect to the defendant, Drake, considered by the Federal court, although as an incident thereto the defendant, Drake, might be ultimately benefitted. It not infrequently happens that a question of fact upon which a right of removal is founded is the fact upon which ultimate recovery may depend. But this incidental question of the right of final recovery against one of the defendants does not in any sense limit the right of the other and the petitioning defendant to have that question of fact determined by the Federal court when the propriety of sustaining its petition for removal comes to be considered. In this case if the petition for removal and the accompanying affidavits had shown as a matter of fact that the defendant, Drake, was

not only not upon the top of the train where the alleged assault took place, but that he was not even in the State of Missouri, the allegation of this fact would have entitled the petitioning defendant to have that question of fact determined in the Federal court, and the circumstance that its determination might influence the ultimate right of recovery against the defendant, Drake, would be but an incidental consideration. How questions of fact alleged in a petition for removal may be determined when they come to be considered by the Federal court is not important, the sole consideration, so far as the removal question is concerned, being that the allegations of fact upon which the right of removal is founded must be taken as true by the State court, and the ultimate determination of their correctness is to be alone determined by the Federal court.

Neither is the fact of importance that, following an improper refusal of a State court to grant a removal, a jury should return a joint verdict against both the non-resident and the resident defendants.

"The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried."

Whitcomb v. Smithson, 175 U. S. 635, 638.

Considering this situation in *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308, 316, Mr. Justice HOLMES said:

"That fact has no bearing upon the case."

This position is well illustrated by the converse of the proposition. That is to say, the finding of a jury in the State court following a refusal to remove, that the resident defendant was not liable, does not show fraud in joining him as a defendant, nor that the case was removable when the petition therefor was filed. *Illinois Central R. Co. v. Outlands', Admrx.*, 170 S. W. Rep. 48 (Ky.)

So, it has been held by this court, that a decision upon the trial in a State court, after a petition for removal has been denied, to the effect that there is no liability against the resident defendant, does not show that the case was removable at the time the original petition therefor was filed, nor does it make it removable at the time of such ruling by the trial court. *Whitcomb v. Smithson*, 175 U. S. 635; *Alabama & Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 217; *Lathrop, Shea & Co. v. Interior Construction Co.*, 215 U. S. 246, 251; *American Car and Foundry Co. v. Kettelhake*, 236 U. S. 311, 315–316. The action of a court or

jury upon the merits of a controversy cannot control or be persuasive upon a consideration of the question of jurisdiction. It is fundamental, as this court has so frequently held, that the question of jurisdiction must be determined by and only by the record as it stood at the time the petition for removal and its accompanying documents were filed.

The case of *Sears v. Atchison, T. & S. F. Ry. Co.*, 147 S. W. Rep. 860, 163 Mo. App. 711, is in point. The decision in that case was rendered by the Kansas City Court of Appeals, and, it is submitted, states the rule which should have prevailed in the Supreme Court of Missouri in this case. In that case the plaintiff was an employe of the Wabash Railway Company, and while acting as an engineer suffered personal injuries, to recover for which he brought suit against the Wabash Company and the Atchison, Topeka and Santa Fe Railway Company, alleging that they were jointly liable for his injuries. The Santa Fe Company, a foreign corporation, filed a petition for removal, alleging that the Wabash Company, a domestic corporation, had been made a party and charged with joint liability, with the fraudulent purpose of depriving the petitioning defend-

ant of the right of removal. The petition for removal stated that the allegations of the petition were false and known to be so when pleaded. The petition for removal then stated the facts of the case, which, if true, showed that the Wabash Company, the resident defendant, was not responsible. The removal was denied and there was judgment for the plaintiff against the defendants. In holding that the petition for removal should have been sustained, the court said:

"If a non-resident is sued in a State court, he has a right to have the cause removed to the Federal court, unless there is joined with him one or more defendants who are residents of the State. If that is done, as, for instance, in cases of joint liability, there is no right of removal. But if the joinder is fraudulently made and a joint cause of action untruly and fraudulently charged, for the purpose of depriving the Federal court of jurisdiction, it will not be allowed that effect, and a removal will be had on the petition of the non-resident.

"How and where are these matters to be determined? The character of the action is, in the first place, judged by the claim the plaintiff, in good faith, makes in his petition. . . . But this is all based on the assumption that plaintiff has acted in good faith, even though mistaken. . . . So, if the joinder is fraudulently made and a joint cause of action untruly and fraudulently charged,

for the purpose of depriving the Federal court of jurisdiction, it will not be allowed that effect and a removal will be had on the petition of the non-resident. Therefore, on the question of fraudulent purpose in the plaintiff in making the joinder, if the petition for removal tenders matters of fact, as an issue, the removal should follow, as of course, and that issue of fact tried in the Federal court.

. . .

"Tested by the foregoing rules, the petition in the present case must be held to have entitled defendant to an immediate removal of the cause. It states the cause of action to be severable and states the reasons why it is, which reasons are founded on certain facts therein set out in detail. It states that plaintiff knew those facts, and that with such knowledge he has alleged in his petition a fictitious statement of matters as and for the facts of the case, upon which a joint liability is made out, and that all this was done for the fraudulent purpose of defeating the jurisdiction of the Federal court."

The decision of this court in *Wecker v. National Enameling Co.*, 204 U. S. 176, 185-186, seems conclusive of the situation now before the court. In that case a citizen of Missouri brought an action against the Enameling Company, a foreign corporation, and one Wettengel, a citizen and resident of Missouri, charging joint negligence on the part of the defendants which resulted in the in-

jury to the plaintiff. The Enameling Company filed a verified petition for removal, in which it was charged that the resident defendant was not at the time of the accident connected with the work as charged by the plaintiff. This allegation in the petition for removal was supported by affidavits submitted therewith. The plaintiff filed counter affidavits alleging certain facts tending to show the connection of the resident defendant with the accident. Upon the consideration of this allegation and the affidavits in support thereof, the State court granted a removal. And in sustaining not only the practice followed, but the conclusions of the court, Mr. Justice DAY, said:

"While the plaintiff, in good faith, may proceed in the State courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the State courts, in proper cases, to retain their own jurisdiction."

While this method of determining the propriety of the presence of the resident defendant in the suit indirectly settled the qusetion of the ultimate right to recover from him, yet it was not

suggested that such fact should have consideration in determining the question of removal.

The facts in the case at bar come clearly within the rule laid down by this court in *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308, 316. In that case the plaintiff brought suit against a foreign railroad company and two local defendants who were citizens of the same state as the plaintiff. The petition for removal simply alleged that these resident defendants were joined "solely for the purpose of preventing the removal." No facts of any kind were alleged. In discussing this situation, Mr. Justice HOLMES said:

"Of course, if it appears that the joinder was fraudulent as alleged, it will not be allowed to prevent the removal. *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176. And further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fall to be considered in the State courts. *Crehore v. Ohio & Mississippi Ry. Co.*, 131 U. S. 240, 244. *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207. On the other hand, the mere epithet fraudulent in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors

jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Bohon*, 200 U. S. 221. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false."

In the case now before the court the Railway Company did not stop with the mere allegation that the joinder of the resident defendant was fraudulent and solely for the purpose of preventing the removal, but it went further, and not only alleged, but supported the allegation with verified statements of fact, that as a matter of fact the resident defendant was not and could not have been either liable as charged or present at the time and place of the alleged transaction. It was charged that the plaintiff fraudulently joined the resident defendant in order to deprive the Rail-

way Company of its right of removal, and verified facts were produced to substantiate the claim, which facts, so far as the State court was concerned, were bound to be taken as true. When taken as true the petition for removal and the affidavits in support thereof show that the charge against the resident defendant was both fraudulent and false. In the Sh[illegible]og case, on the contrary, it appeared that under the laws and decisions of the courts of Kentucky lessor and lessee railway companies were jointly liable as a matter of law. Under such circumstances the joinder could not be fraudulent, as the motive of the plaintiff in filing a joint action could not be questioned.

The recent decision of this court in *Chesapeake & O. Ry. Co. v. Cockrell, Admr.*, 232 U. S. 146, 154, fully sustains the contention of the plaintiffs in error. In that case suit was brought by an administrator to recover for the death of his intestate, the defendants being a railway company and an engineer and fireman in charge of of one of its trains which struck and killed the intestate. The individual defendants were citizens of the same state as the plaintiff. The only charge of negligence in the petition was that the individual defendants had been negligent in fail-

ing to keep an adequate lookout ahead of the engine, in failing to give any warning of the approach of the train, and in continuing to run the train after it struck the intestate. The petition for removal while admitting that the individual defendants were upon and operating the engine, and in charge of the train, alleged that the allegations of the petition with *respect to their negligence* were untrue, and made for the purpose of preventing a removal. This court held that a petition for removal, as in other pleading, must contain a statement of the facts relied upon and not otherwise appearing, in order that the court may draw the proper conclusion from all of the facts, and that in the event of a removal, the opposing party may take issue, by a motion to remand, with what is alleged in the petition.

In the Cockrell case the petition for removal amounted to nothing more than an allegation that the resident defendants, although in charge of the engine, were without fault in its management. This was a mere conclusion, and this court said:

"With the allegation that they were operating the train which did the injury standing unchallenged, the showing amounted to nothing more

than a traverse of the charges of negligence. . . . As they admittedly were in charge of the movement of the train and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company."

The following language of this court from the Cockrell case stating the settled principle of law applicable to the case at bar, is conclusive of the situation:

"A civil case, at law or in equity, presenting a controversy between citizens of different States and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the State in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. . . . So, when in such a case a resident defendant is joined with the non-resident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fraudulent' to the joinder will not suffice: the showing must be such as compels the con-

clusion that the joinder is without right and made in bad faith. . . .

"While this conclusion requires an affirmance of the judgment, we would not be understood as approving the reasoning upon which the action of the trial court was sustained by the Court of Appeals of the State. That court, apparently assuming that the petition for removal contained a sufficient showing of a fraudulent joinder, held that the questions of fact arising upon the petition were open to examination and determination in the State court, and that no error was committed in refusing to surrender jurisdiction, because upon the subsequent trial the evidence indicated that the showing in the petition was not true as to the fireman. In so holding the Court of Appeals fell into manifest error, for it is thoroughly settled that issues of fact arising upon a petition for removal are to be determined in the Federal court, and that the State court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition. *Stone v. South Carolina*, 117 U. S. 430, 432; *Crehore v. Ohio & Mississippi Ry. Co.*, *Illinois Central R. R. Co. v. Sheegog, and Chicago Rock Island & Pacific Ry. Co. v. Dowell, supra.* In this case had the petition contained a sufficient showing of a fraudulent joinder, accompanied as it was by a proper bond, the State court would have been in duty bound to give effect to the petition and surrender jurisdiction, leaving any issue of fact arising upon the petition to the decision of the Federal court."

Tested by this rule the petition for removal in the case at bar should have been sustained. The plaintiff charged in his petition that while sitting on top of one of the freight cars in the train the defendant Drake kicked him from the top of said freight car, causing the injuries complained of. The petition for removal charged, among other things, that Drake *was not present at the time and place in question*, which fact was known to the plaintiff at the time of the institution of the suit. In support of this allegation of the petition for removal, and as a part of said petition for removal, two affidavits were filed, one by a rear brakeman on the freight train, the other by the defendant, Drake, both of which stated in unequivocal terms that the defendant, Drake, *was not and could not have been on top of the train, or at any other place upon the train where the plaintiff claims to have been*, on the trip in question. In short, these verified allegations of fact showed that the defendant, Drake, was not and could not have been present at the place where the ejectment is alleged to have occurred; that he was not and could not have been at any place upon the train where the plaintiff claims to have ridden; that these facts were known to the plaintiff at the time the suit

was filed; and that the allegations of the petition were fraudulent and false, and so knowingly inserted for the purpose of preventing a removal to the Federal court. For the purposes of removal these allegations of fact were bound to have been taken by the State court as true, and if true, the fraudulent device of the plaintiff was ineffective to prevent the Railway Company from exercising the rights which were guaranteed to it by the Constitution and laws of the United States.

It is respectfully submitted that the decision of the Supreme Court of the State of Missouri is erroneous, and that its judgment should be reversed with directions that the case be remanded for removal to the proper court of the United States.

PAUL E. WALKER,
M. L. BELL,
Attorneys for Plaintiffs in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 111.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND FRANK DRAKE, PLAINTIFFS IN ERROR,

vs.

DANIEL C. WHITEAKER, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SUGGESTIONS FOR PLAINTIFFS IN ERROR IN REPLY.

PAUL E. WALKER,
Attorney for Plaintiffs in Error.

IN THE

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SUGGESTIONS FOR PLAINTIFFS IN ERROR IN REPLY.

Owing to the inability of counsel to be present when the case was called, permission is respectfully asked to file the following suggestions in reply to the brief and argument of the defendant in error:

In answer to the contention that the allegations of fact in the petition for removal, which were substantiated by affidavits showing the facts in detail and which were received without objection, were for the consideration of the United

States Court alone when the case was pending in that court after removal, three contentions are made by the defendant in error:

First. That the only test of the question whether a joinder is fraudulent is whether the plaintiff, notwithstanding the fraud and falsehood, intends to press his claim for judgment against the resident defendant. The contention is thus stated by counsel for the defendant in error:

> "It is true that the falseness of the facts charged in plaintiff's petition may be important as evidence tending to establish the intention, but present the intention on plaintiff's part to really secure judgment against the resident defendant, then falseness of the facts charged in plaintiffs' petition affords no right of removal."
>
> Brief of Defendant in Error, page 11.

This argument, if adopted, would establish the rule that if a plaintiff steadfastly adhered to his intention to obtain a judgment against the resident defendant upon the false and fraudulent allegations of his petition a litigant would be powerless to exercise the rights guaranteed to him by the Constitution and laws of the United States and on account of an admittedly false and fraudulent device. The statement of the claim is its refutation. The avowed intention to commit fraud can never be the justification of it. From the earliest consideration of the removal statutes down to the latest expressions of this court upon the subject false and fraudulent devices conceived for the purpose of preventing a litigant from exercising a guaranteed right of removal have been unequivocally condemned.

> "It would be a very dangerous doctrine—one utterly destructive of the rights which a man has to go into the Federal courts on account of his citizenship—if the plaintiff in the case in instituting his suit can without any right or reason, or just cause, join persons who have not the requisite citizenship and thereby destroy the rights of parties in Federal

courts. We must therefore be astute not to permit devices to become successful which are used for the purpose of destroying that right."

Mr. Justice Miller in Arapahoe Co. *vs.* Railway Co., 4 Dill. 277.

"While the plaintiff, in good faith, may proceed in the State courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court, where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the State courts, in proper cases, to retain their own jurisdiction."

Wecker *vs.* National Enameling Co., 204 U. S., 176, 185-186.

"A civil case, at law or in equity, presenting a controversy between citizens of different States, and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the State in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. * * * So, when in such a case a resident defendant is joined with the non-resident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal."

Chesapeake & O. Ry. Co. *vs.* Cockrell, Admr., 232 U. S., 146, 154.

It is not denied that the facts alleged in the petition for removal, and the accompanying affidavits, specifically pleaded facts from which the conclusion is compelled that the facts alleged in the petition were false and fraudulent, but it is insisted that it should be assumed from the petition that the plaintiff intended to press the charges against the resident defendant, and that, therefore, the falseness of the

facts set forth in the petition is only *evidence* tending to establish the intention of the plaintiff in joining the resident defendant. Courts will never permit falsehood to become such a facile instrument for the undoing of legal rights. The fact that a plaintiff intends to follow up a false and fraudulent charge against a resident defendant, by equally false and fraudulent proof, cannot be a justification for the attempt. But if it could be contended properly that the sole test of fraudulent joinder was the intention of the plaintiff, not in joining the resident defendant but in asking for a judgment against him, it is even then conceded that such false allegations can be considered "as evidence tending to establish the intention" of the plaintiff. If the intention of the plaintiff is the ultimate fact to be ascertained, and if the falsehood and fraud shown by the record are to be considered as evidence only of such intention, nevertheless this fact can only be considered, upon the determination of the right of removal, by the United States court, after the cause has been removed.

The argument of counsel for the defendant in error is claimed to be founded upon the opinion of this court in Chicago, R. I. & P. Ry. Co. *vs.* Schwyhart, 227 U. S., 184. No question of fraudulent joinder was considered in that case. The questions decided there were: that whether a petition stated a joint liability was a matter of State law and that this court would not go behind the decision of the highest court of the state on that point; and that if a joint cause of action existed the motive of the plaintiff in joining the defendants was immaterial. This decision will never lend assistance to the claim that removal can be prevented by a false and fraudulent joinder if the pleader assiduously pursues his fraudulent purpose.

Second. It is admitted by counsel for defendant in error, that if any other ground of negligence had been inserted in the petition than the negligence of the resident defendant, then the facts set forth in the petition for removal and

the accompanying affidavits would have "engendered a *prima facie* belief of fraudulent joinder in the mind of the State court, and raised an issue for the decision of the Federal court."

(Brief of Defendant in Error, page 11.)

The contention is, therefore, that if the case of a plaintiff is based alone upon the alleged negligencce of the resident defendant, however false and fraudulent, the right of removal can be subverted, but that the same allegations of fact will entitle the petitioning defendant to a removal, if, perchance, the plaintiff had seen fit to charge other acts of negligence than those of the resident defendant. The question of the fraudulent joinder of a resident defendant cannot be made to depend upon the singleness of purpose with which a plaintiff pursues his fraudulent charge, neither can it be made to depend upon the presence in the case of issues not even remotely connected with the question of jurisdiction. How could it have affected the question of removal presented if the petition had contained the additional charge that the defendant railway company was itself negligent in keeping in its employ the resident defendant, knowing him to be a man of vicious habits and ungovernable temper, and when it knew that his habit and custom was viciously to assault trespassers found upon his trains, and without making an attempt to eject them properly and humanely?

In determining the right of removal, the court cannot look forward through the intricacies and exigencies of a trial, and determine upon the question of jurisdiction the inference, assumption or supposition as to what the final result of the controversy may be.

Whenever the facts in a petition for removal show that the resident defendant was fraudulently joined for the purpose of preventing a removal, the cause is removable, notwithstanding the fact that the determination of this fact indirectly affects the ultimate right of recovery against the resident defendant, and through him of the petitioning de-

fendant. The fact that the petitioning defendant may or may not be liable on other grounds can be of no importance in determining this question of jurisdiction. It is not possible that the decision of this court in Wecker *vs.* National Enameling Co., 204 U. S., 176, would have been contrary if the only charge of negligence against the employer had been the personal negligence of the resident defendant, which was found to be fraudulent and false, and made for the purpose of preventing a removal to the United States court.

Every time the facts show that the resident defendant was fraudulently joined, and that there is no responsibility on his part for the cause of action, it results that no recovery can be had against him, but this fact does not control the right of removal simply because, as the petition is then drawn, no other cause of action is stated. This is not the determination of the merits of the controversy. Upon removal, petitions may be amended to show the facts either before the trial, or, in Missouri, after the evidence is completed; new facts may be found and alleged, many circumstances may arise at the trial which may altogether change the claims and fix liability without respect to the alleged negligence of the resident defendant.

It not infrequently occurs that the determination of a jurisdictional fact may finally be determinative of the present claims in a petition. For instance, this court has always held that questions of fact relative to the citizenship of one of the parties must be determined solely by the Federal court. The laws of Missouri provide that no one but a citizen and resident of that State may be appointed administrator of an estate in that State. Under certain circumstances the death statute of Missouri provides for recovery only by an administrator. If suit were brought in Kansas, for instance, against a foreign corporation, by a plaintiff alleging himself to be an administrator appointed by a Missouri court, in an attempt to recover damages under the Missouri death statute, a petition for removal might al-

lege that as a matter of fact the plaintiff was a citizen and resident of Kansas, entitling the petitioning defendant to a removal. This jurisdictional fact, therefore, would not only be determinative of the right of removal, but would be conclusive of the claim as thus presented, because if the plaintiff was a citizen of Kansas he could not recover as a matter of law under the Missouri statute.

This result does not, in the supposed case, determine the merits of the claim. Upon removal, if the Federal court finds the allegations of the petition for removal to be true, it simply means that no recovery can be permitted under the petition as it then stands, but it does not touch upon the question of whether under another petition properly brought, or the present one properly amended, the cause of action cannot be enforced. So in the case before this court, if the Federal court on removal had found that the allegations of the petitioning defendant were true, it would simply have made it necessary for the plaintiff, when the case was reached for trial, to amend his petition and allege facts showing that the petitioning defendant was liable for the assault for some reason other than the fraudulent and false allegations against the resident defendant. This was not the determination of the merits of the controversy as to whether the plaintiff could recover for an alleged assault; it was but the insistence of the petitioning defendant that in the petition as it then stood there were false and fraudulent statements set forth for the purpose of preventing a removal of the cause to the Federal court, and that the allegations of fact, in the petition for removal, showing this falsehood and fraud should be removed to the Federal court for determination.

This court is asked to "ignore a declaration of fact" in the petition for removal, and to give support to the contention that the State court was not bound to give credence to the allegations of fact in the petition for removal (Brief of Defendant in Error, page 10), because the plaintiff would

be bound at the trial upon the merits to prove the charges, alleged to be fraud and falsehood by the petition for removal, as to the resident defendant if recovery could be had against the Railway Company *on account of the alleged negligence of the resident defendant.*

After admitting that the facts alleged in the petition for removal are sufficient to entitle the petitioning defendant to a removal, the right cannot be denied by an uncertain calculation as to what may or may not take place at the trial upon the merits.

At page 16, counsel for defendant in error again says:

> "If true, the removal petition disclosed that plaintiffs' entire case was ill-founded and without merit, because under the State law and the pleadings, when the case fell as to the servant Drake, it fell as to the Railway also."

This plain admission, that the petition for removal pleaded facts which, if true, showed a fraudulent joinder, settles the present controversy. The State court was bound to accept the allegations of the petition for removal as true, and whether upon the trial of the cause upon its merits in the Federal court after removal it may become necessary for the plaintiff to amend his petition to conform to the facts in order to recover against the Railway Company is a question foreign to the issue here.

Third. It is finally contended that the verdict of the jury against the resident defendant should relate back and become determinative of the question of jurisdiction. In the brief and argument of counsel for the defendant in error no claim is attempted that the allegation in the petition for removal, that the resident defendant was at no time at the place where the assault was committed, if at all, and that he could not, as a physical possibility, have been connected therewith, which allegation was substantiated by verified allegations showing not only that the resident de-

fendant was absent from the place where the alleged acts transpired, but the detailed facts demonstrating why he could not have been present or participated in the assault, did not raise questions of fact which, if true, showed conclusively that the resident defendant was fraudulently and falsely joined for the purpose of preventing a removal, nor that the determination of the truth of such facts was for the Federal court to which removal was sought. The only question discussed was one not raised on this writ of error. In the petition for removal was another allegation that "the servant was joined without any intention to secure judgment against him." The entire argument, of course, for defendant in error is directed to this allegation. If this was the only allegation in the petition for removal respecting the fraudulent joinder, no case for removal would have been made out. This charge was a justifiable conclusion resulting from the facts alleged and proven, but it was such other facts so alleged and proven which raised a clear question of fact for the determination of the Federal court—that is, that the resident defendant was not and could not have been, as the allegations and detailed proof showed, either present when the assault was made or connected with it in any remote way; that the plaintiff knew these facts when the suit was commenced, but that notwithstanding this knowledge he charged the assault to the resident defendant because he was a citizen of Missouri, intending by this false and fraudulent means to deny to the Railway Company the right to remove the cause of action to the Federal court. The only suggestion made by counsel for the defendant in error to this, the only phase of the case before this court, was that the affidavits showing the facts in detail could not be considered. They were received without objection, and their use is universal and has the approval of this court in such proceedings.

Wecker *vs.* National Enameling Co., 204 U. S., 176.

The verdict of the jury in the State court against both defendants cannot be taken as proof that the removal was properly denied. It has long been the settled law that neither the decision of a court nor the verdict of a jury, either for or against a resident defendant, can be considered in the determination of the question of jurisdiction upon a petition for removal. A ruling or decision on the merits cannot relate back and determine the correctness of a ruling on the question of jurisdiction.

Whitcomb *vs.* Smithson, 175 U. S., 635, 638.

Illinois Central R. Co. *vs.* Sheegog, 215 U. S., 308, 316.

Alabama & Great Southern Ry. Co. *vs.* Thompson, 200 U. S., 206, 217.

Lathrop, Shea & Co. *vs.* Interior Construction Co., 215 U. S., 246, 251.

American Car & Foundry Co. *vs.* Kettelhake, 236 U. S., 311, 315, 316.

The right of removal was granted to non-residents in order that they might have a tribunal in which they could litigate their differences and be free from local influence or the prejudice of local juries, and the right to a removal cannot be determined by the verdict of a jury, upon other phases of a case under consideration, from whose prejudice and bias the Constitution and laws of the United States gave the petitioning defendant the right to be free.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1915.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and FRANK DRAKE,
Plaintiffs in Error,

vs.

DANIEL C. WHITEAKER.

In Error to the Supreme Court of the State of Missouri.

No. 111.

STATEMENT, BRIEF AND ARGUMENT ON THE PART OF DEFENDANT IN ERROR.

(Note: With the permission of the Court we will refer to defendant in error as plaintiff.)

STATEMENT.

The only question raised in this Court is as to whether the petition for removal filed in the state court by the non-resident Railway Company was properly denied.

The suit was instituted against the Railway Company and one Frank Drake, its conductor, for the wrongful acts of Drake, the conductor, and no other act of negligence or ground for recovery was predicated against the Railway Company, save and except the acts of Drake.

The petition was so drawn that the plaintiff below took upon himself *the burden of securing a joint judgment against both the non-resident Railway and the resident servant,* Drake. The servant could not have been released and the Railway Company held. Plaintiff below, under his petition, was compelled to secure a judgment against Drake, the servant, before he could recover against the Railway. See opinion of Missouri Supreme Court, pages 12-13, Transcript of Record, where we find the following:

> "So patent is the joint liability in the instant case that if Drake had been acquitted the corporate defendant would have escaped, too, as a matter of law."

The petition for removal filed by the Railway Company charged that Drake, the servant, was fraudulently joined for the purpose of preventing removal, and without any intention or hope on the part of plaintiff to secure judgment against said Drake.

That charge is in the following language:

> "That his presence as a defendant in this suit was for the sole and fraudulent purpose of defeating and preventing your petitioner from removing this action as aforesaid to the

United States Circuit Court for the St. Joseph Division of the Western District of Missouri; that the plaintiff did not have, *and could not have had,* at the time of the institution of this suit, nor has he now, any cause of action against the defendant Frank Drake, or any reasonable ground upon which to base a cause of action, or upon which to base a recovery against the defendant Frank Drake; all of which was known to the plaintiff at the time of the institution of said suit; that the defendant Frank Drake was not present at the time and place mentioned in plaintiff's petition, all of which was known to the plaintiff at the time of the institution of said suit; that the said Frank Drake is a man of small means, and he has no, or but little, property from which a judgment against him in this action, if such were recovered, could be collected, and that this defendant is, and was at the time of the institution of this action, entirely solvent and able to pay any debts that may exist against it; that it has a large amount of property, and more than sufficient to pay the amount sued for in this action within the jurisdiction of this court, and, according to the allegations in plaintiff's petition, any act of negligence on the part of the defendant Frank Drake alleged to have produced the injury to this plaintiff was an act of this defendant, and, accordingly, this defendant is responsible and liable for the same. That the plaintiff, when he instituted this action, did not have any reasonable hope, intention or expectation of recovering any judgment or collecting any money from the defendant Frank Drake on account of the accident or injuries to the plaintiff mentioned in the petition."

It will be noted that the allegations in the petition for removal were limited to a denial of the acts charged in plaintiff's petition by repeating and denying each one separately and with the further allegation that Drake was not present at the scene of the accident.

The view taken by the Supreme Court of Missouri on the removal question was that, while it conceded that all questions of fact properly raised and existent from the face of the pleadings were for the federal court to pass upon, yet, inasmuch as the face of the record disclosed that plaintiff under his petition was required to secure a judgment against Drake before he could recover against the Railway, it conclusively showed that plaintiff below joined Drake as a party defendant with a real intention of securing judgment against him, and that therefore the cause was not removable. (See Transcript of Record, pages 10-13. *Whiteaker* v. *Chicago, R. I. & P. R.*, 252 Mo. 438, 160 S. W. Rep. 1009.)

The judgment below was against both the defendant Railway Company and the servant Drake.

POINTS AND AUTHORITIES.

The petition for removal was properly denied.

Chesapeake & Ohio R. R. v. *Cockrell,* 232 U. S. 146.
Chicago, R. I. & P. Ry. v. *Schwyhart,* — U. S. —
Chicago, B. & Q. R. R. v. *Willard,* 220 U. S. 413.
Illinois C. R. R. v. *Sheegog,* 215 U. S. 308.
Southern R. Co. v. *Miller,* 217 U. S. 209.
Alabama R. Co. v. *Thompson,* 200 U. S. 206-216.

On removal, the only question to consider was whether there was a real intention to get a joint judgment, and whether there was colorable ground for it shown as the record stood at the time the removal was denied.

Chicago, R. I. & P. Ry. v. *Schwyhart,* — U. S. —

Under the petition and the Missouri law, unless plaintiff obtained a judgment against the servant defendant he could not recover against the Railway Company, and plaintiff will be presumed to have joined the servant in good faith, and with the intent to get a joint judgment.

Transcript of Record, pages 12-13.
McGinnis v. *Railway,* 200 Mo. 347.
Whiteaker v. *Chicago, R. I. & P. R.,* 252 Mo. 438.

Where a master and servant are joined as defendants and a judgment is sought against the master on the sole grounds of the servant's negligent acts, then any claim of fraud and falsehood in joining the servant goes to the merits of the action as an entirety, and not to the joinder, and indicates that plaintiff's case is ill founded as to all the defendants.

Chesapeake & Ohio R. Co. v. *Cockrell*, 232 U. S. 146.

All doubts are to be resolved in favor of the jurisdiction of the state court. No presumption can be indulged in favor of the jurisdiction of the federal court.

Railroad v. *Davidson*, 157 U. S. 208.
Hanrick v. *Hanrick*, 153 U. S. 192.
Shaw v. *Mineral Co.*, 145 U. S. 444.

The state court is not ousted of jurisdiction unless the cause is properly removable. Federal jurisdiction cannot be inferred, but it must appear positively upon the face of the pleadings.

Hanford v. *Davis*, 163 U. S. 273.
Bors v. *Preston*, 111 U. S. 252.
Mansfield v. *Swan*, 109 U. S. 278.
Steamship Co. v. *Tugman*, 106 U. S. 118.
Railroad v. *Carson*, 194 U. S. 138.

The joint liability of the defendant under the pleadings is a matter of state law, and the decision of the highest court of the state will not

be reversed by the Federal Supreme Court on the question of fraudulent joinder to prevent removal.

C., R. I. & P. Ry. v. *Schwyhart,* 227 U. S. 184.

Chicago, R. I. & P. R. v. *Dowell,* 229 U. S. 102.

Alabama, etc., R. v. *Thompson,* 200 U. S. 206.

Illinois C. R. v. *Sheegog,* 215 U. S. 308.

BRIEF AND ARGUMENT.

At the outset we desire to say that we concede that the plaintiff cannot defeat the right of removal from a state to a federal court by fraudulently joining a resident as a defendant. We also agree with defendant Railway that all issues of fact properly raised by a petition for removal and the record in the cause are to be decided by the federal court to which the removal is sought.

The defendant Railway Company's brief and argument in this cause is devoted solely to an effort to uphold these two well-established points, and we are pleased to join with our opposing counsel in affirming both their existence and justice.

We would respectfully urge the Court to note that there is one vital point of difference between the case at bar and each and every one of the cases cited by defendant Railway Company in its brief. In every one of those cases, in which the question of fraudulent joinder was raised, the petition and state law were such that upon a trial in the state court, after a removal was denied, the resident defendant could be acquitted of liability and the non-resident defendant held. While in the case at bar, under the petition and the Missouri law, plaintiff was bound to recover judgment against the resident servant or fail entirely in his action, as he could not hold the non-resident Railway

in the event the finding was in favor of the resident defendant. (See Abstract of Record, pages 12-13.)

McGinnis v. *Chicago, R. I. & P. R.*, 200 Mo. 347.
Whiteaker v. *Chicago, R. I. & P. R.*, 252 Mo. 438.

The Supreme Court of Missouri, in passing upon the petition in this cause and this question of state law, in its opinion herein, says:

> "So patent is the joint liability in the instant case that if Drake had been acquitted the corporate defendant would have escaped, too, as a matter of law." (See Abstract of Record, pages 12-13.)

And these are questions to be decided by state law.

Chicago, R. I. & P. R. v. *Schwyhart*, 227 U. S. 184.
Chicago, R. I. & P. R. v. *Dowell*, 229 U. S. 102.
Alabama, etc., R. v. *Thompson*, 200 U. S. 206.
Illinois C. R. v. *Sheegog*, 215 U. S. 308.

Thus it is seen that the allegation of fact which defendant Railway attempted to raise in the petition for removal, *i. e.*, "that the servant was joined without any intention to secure judgment against him, but for the purpose of holding the case in the state court so that judgment could be had against the non-resident railway," was ***absolutely impossible and false,*** and this was shown on the

face of the record at the time the removal was denied.

The allegation of fraud made by defendant in the removal petition was completely refuted by the record and shown to be not only falsehood and perjury, but an attempt to charge a fact whose existence was wholly impossible under the Missouri law.

Was the state court bound to give credence to an allegation which it knew, from the record, to be false and impossible to exist under the state law? Such an allegation was itself a fraud against the court and the plaintiff, and was the court, knowing it to be such from the record, bound to stultify itself and reward the fraud by granting its purpose?

It is a principle too well established to require citation of authorities that courts will ignore a declaration of fact, whether from a witness on the stand or in a pleading, that is contrary to natural law or whose existence is impossible. To hold otherwise would be to transform our courts from "refuges of justice" to rendezvous for fraud.

What is the test as to whether a joinder is fraudulent or not?

This Court in a very late case has laid down the rule by which the question of fraudulent joinder is to be decided. It is the case of *Chicago, R. I. & P. R.* v. *Schwyhart*, 227 U. S. 184.

That rule is, in the language of Mr. Justice Holmes, as follows:

> "On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment, and whether there was a colorable ground for it shown as the record stood when the removal was denied."

Under this well considered rule it is not a question of the truth or untruth of the causes of action stated in plaintiff's petition that tests the fraud or absence of fraud in the joinder. But it is the *intention of the plaintiff* as to securing judgment against the resident defendant that decides his fraud or good faith in the joinder.

It is true that the falseness of the facts charged in plaintiff's petition may be important as evidence tending to establish the *intention*, but present the intention on plaintiff's part to really secure judgment against the resident defendant, then falseness of the facts charged in plaintiff's petition affords no right of removal.

And in the case at bar, had it not been disclosed by the record to be utterly impossible for plaintiff to perform the fraud he was charged with in the joinder, *i. e.*, "of joining the resident servant without any intention to secure judgment against him, but merely with the intention of holding the Railway in judgment in the state court," then the recital of facts may have engendered a *prima facie* belief of fraudulent joinder in the mind of the state court and raised an issue for the decision of the federal court. Likewise, if there had been any other ground for recovery stated against the Railway except the personal acts of Drake, the servant.

Let us apply the above test in the Schwyhart case to the case at bar.

Was there a real intention to get a joint judgment?

If the plaintiff secured any judgment at all against the Railway Company he, *of necessity*, had to obtain a judgment against the servant, Drake, since plaintiff only sought to hold the master for the acts of the servant.

Under the law and the petition it was impossible to recover against the railway and not against the servant.

Plaintiff must procure a joint judgment or no judgment at all against the master. There can be no question as to plaintiff's real intention to procure a joint judgment.

On this issue the Railway Company is in the absurd and senseless attitude of contending that plaintiff joined the servant without any intention of getting judgment against him, merely for the purpose of giving jurisdiction to the state court in the case against the Railway, and at the same time admitting that unless plaintiff did recover against the servant he could not recover at all.

A Case Decisive.

The case of *Chesapeake & Ohio Railway Company* v. *Cockrell*, 232 U. S. 146, which is the last utterance of this Court on the question of fraudulent joinder to prevent removal, is clearly decisive of the case at bar. That decision leaves no room for doubt as to the correctness of the ruling of the state court on the petition for removal in this case.

The *Cockrell case, supra,* was a case where the plaintiff sued a non-resident railway in the Kentucky court and joined its engineer and fireman, residents, as defendants, they being on and operating the railway's engine that injured the plaintiff.

The only point of difference in the Cockrell case and the case at bar is, that while in the instant case no recovery could be had against the railway unless the servant Drake was held also, yet in the Cockrell case both servants defendant could be acquitted of liability and the railway held. And in truth in that case both resident servants were released and the non-resident railway company alone held.

The allegations and character of the petition for removal in the Cockrell case are identical with the allegations in the present case. We quote the following from the opinion delivered by Mr. Justice Van Deventer in that case:

> "The railway company's petition for removal, while not denying that the engineer and fireman were in the employ of the company, or that they were in charge of the train when it struck and injured the intestate, did allege that the charges of negligence (*all being specifically repeated*) against the defendants were each and all 'false and untrue, and were known by the plaintiff to be false and untrue, and were made for the sole and fraudulent purpose of affording a basis, if possible, for the fraudulent joinder * * * and that none of the charges of negligence on the part of the engineer and fireman could be sustained on the trial.' "

The removal petition in the instant case, in so far as is now important, is as follows:

> "That his presence as a defendant in this suit was for the sole and fraudulent purpose of defeating and preventing your petitioner from removing this action as aforesaid to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri; that the plaintiff did not have, *and could not have had*, at the time of the institution of this suit, nor has he now, any cause of action against the defendant Frank Drake, or any reasonable ground upon which to base a cause of action, or upon which to base a recovery against the defendant Frank Drake; all of which was known to the plaintiff at the time of the institution of said suit; that the defendant Frank Drake was not present at the time and place mentioned in plaintiff's petition, all of which was known to the plaintiff at the time of the institution of said suit; that the said Frank Drake is a man of small means, and he has no, or but little, property from which a judgment against him in this action, if such were recovered, could be collected, and that this defendant is, and was at the time of the institution of this action, entirely solvent and able to pay any debts that may exist against it; that it has a large amount of property, and more than sufficient to pay the amount sued for in this action within the jurisdiction of this court, and, according to the allegations in plaintiff's petition, any act of negligence on the part of the defendant Frank Drake alleged to have produced the injury to this plaintiff was an act of this defendant, and, accordingly, this defendant is responsible and liable for the same. That the plaintiff, when he instituted this

> action, did not have any reasonable hope, intention or expectation of recovering any judgment or collecting any money from the defendant Frank Drake on account of the accident or injuries to the plaintiff mentioned in the petition."

In this case, as in the Cockrell case, the petition for removal merely traversed the allegations of fact in the petition, and under each they were denied specifically.

It will be noted that it contains nothing but conclusion and does not plead facts at all. The only fact attempted to be set out is, "that the defendant Drake was not present at the time and place mentioned in plaintiff's petition." What time is meant? What place is meant? Plaintiff's petition names several places and times. It names the City of Lathrop, the town of Turney and the City of Cameron Junction, and a different time is applied to each of these places.

Defendant Railway filed the affidavits of two of its employees with the removal petition, but clearly affidavits cannot take the place of or help out the defects or shortcomings of the pleading. If an issue of fact was properly raised, it was the duty of the state court to grant the removal without proof, and the affidavits filed are of no concern.

In passing upon the removal question in the *Cockrell* case, *supra,* this court held that where the master is sought to be held on the sole ground of the servant's acts, then any claim of fraud in joining the servant goes to the merits of the action

as an entirety, and not to the joinder, and indicates that plaintiff's case is ill founded as to all the defendants.

From that decision we quote the following:

> "As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all of the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them. As their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company. We conclude, therefore, that the petition for removal was not such as to require the state court to surrender its jurisdiction."

Applying the rule in the *Cockrell* case, *supra*, we find that the petition for removal in the case at bar did not raise the issue of fraudulent joinder at all, but instead it stated matters which, if true, would defeat the plaintiff entirely and therefore went to the merits of the action. If true, the removal petition disclosed that plaintiff's entire case was ill founded and without merit, because under the state law and the pleadings, when the case fell as to the servant Drake, it fell as to the Railway also.

We again request the court to note that the only point of difference between the Cockrell case and the case at bar, is that in the former case, under the pleadings and Kentucky law, the resident servants could be, and in fact were released at the trial in the state court, while in the instant case, the recovery must be joint or plaintiff fail entirely.

All doubts are to be resolved in favor of the jurisdiction of the state court. No presumption can be indulged in favor of the jurisdiction of the Federal court.

Railroad v. *Davidson*, 157 U. S. 208.
Hanrick v. *Hanrick*, 153 U. S. 192.
Shaw v. *Mineral Co.*, 145 U. S. 444.

The state court is not ousted of jurisdiction unless the cause is properly removable. Federal jurisdiction cannot be inferred, but it must appear positively upon the face of the pleadings.

Hanford v. *Davis*, 163 U. S. 273.
Bors v. *Preston*, 111 U. S. 252.
Mansfield v. *Swan*, 109 U. S. 278.
Steamship Co. v. *Tugman*, 106 U. S. 118.
Railroad v. *Carson*, 194 U. S. 138.

Can a non-resident defendant, by making a false and fraudulent charge in the removal petition, defeat and thwart the right of a plaintiff to sue jointly two defendants for a tort in which both are liable? *Can the defendant, by fraud and falsehood, oust the state court of its jurisdiction?*

We are of the opinion that it cannot.

In *Railroad* v. *Sheegog,* 215 U. S. 308, we find the following expression of the court:

> "A man is not to be prevented from trying his case before that tribunal that has sole jurisdiction, if his declaration is true, by a mere allegation that it is *fraudulent and false.* The jury alone can determine that issue."

If there is a joint liability, he has an absolute right to enforce it, whatever the reason that makes him wish to assert the right.

In the Schwyhart case we find the following:

> "Again, the motive of the plaintiff, taken by itself, does not affect the right to remove. If there is a joint liability, he has an absolute right to enforce it, whatever the reason that makes him wish to assert the right."

In *Chicago, B. & Q. R. R.* v. *Willard,* 220 U. S. 413, on the question of removal, we find the following expression of doctrine:

> "A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. * * * The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. * * * It is recognized that the plaintiff may select his own manner of bringing his action, and must stand or fall by his election.
>
> If he has improperly joined causes of action, he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the

> pleadings and the record at the time of the application for removal. And it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill of complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal."

After reading the record in this cause could any sane mind conceive for an instant that the joinder of Drake, the servant, was improper?

That record shows that he must be liable or else no one could be liable. It shows that upon a trial in the state court Drake, *in fact, was found guilty of the acts charged against him* and a judgment rendered. This judgment received the approval of the Supreme Court of Missouri. It stands unchallenged except for the claim of defendant Railway that it should now be destroyed and vacated, not because they claim that Drake, the servant, was not guilty, for they are bound to concede at least that plaintiff had colorable ground for his joinder, but because at some stage in the case they filed a false and perjured pleading which was denied by the court.

To reverse this cause on such grounds would be to crown fraud and perjury with success and victory. And in asking such action at the hands of this august Court, defendant Railway discloses that while it may be the financial ruin and bankrupt that the public press reports, yet it is rich indeed in the courage with which to make brazen demands upon the courts of our country.

We respectfully submit that the cause was not removable and that the ruling of the state court on that question was without error.

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